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In The

Supreme Court of the United States

October Term, 1995

LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,

Petitioner,

v.

STERLING PRESS, INC.,

Respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a forfeiture that is triggered when a motor freight carrier ceases to transport freight for compensation is a forfeiture triggered by the "financial condition" of the carrier within the meaning of the anti-forfeiture provisions of §§ 363(*l*) and 541(c)(1)(B) of the Bankruptcy Code, 11 U.S.C. §§ 363(*l*), 541(c)(1)(B)?

2. Whether § 9 of the Negotiated Rates Act of 1993 ("Rates Act"), Pub. L. No. 103-180, 107 Stat. 2053 (uncodified), which directs that the Rates Act shall not be "construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy," prohibits § 2 of the Rates Act, 107 Stat. 2044-49 (codified at 49 U.S.C. § 10701(f)), from forfeiting property of the bankruptcy estate of a motor freight carrier?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: (1) Leonard L. Gumport in his capacity as trustee of the bankruptcy estate of the Transcon Lines, and (2) Sterling Press, Inc.

By reason of the significance of the issues raised in the proceedings below, the United States of America and the Interstate Commerce Commission participated as *amici curiae*.

Transcon Lines has no subsidiaries. Until April 1990, Transcon Lines was the main operating subsidiary of Transcon, Inc., a corporation listed on the New York Stock Exchange. In April 1990, Transcon, Inc. transferred ownership of Transcon Lines to Growth Financial Corporation, a corporation controlled by Leonard A. Pellulo, who is now a convicted racketeer incarcerated at the Federal Correctional Institution in Minersville, Pennsylvania. In May 1990, Transcon Lines became a debtor in bankruptcy. In June 1990, Mr. Pellulo was ousted from control, and Mr. Gumport was appointed to serve as trustee.

To the best of our knowledge, Sterling Press, Inc. has no subsidiaries or parent corporations.

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PETITION FOR WRIT OF CERTIORARI

Leonard L. Gumport, trustee ("Trustee") of the bankruptcy estate of Transcon Lines ("Transcon"), petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit. That judgment authorizes a forfeiture of the property of the bankruptcy estate of Transcon in violation of § 9 of the Negotiated Rates Act of 1993, Pub.L. No. 103-180, 107 Stat. 2053 (uncodified), and the anti-forfeiture provisions of §§ 363(*l*) and 541(c)(1)(B) of the Bankruptcy Code, 11 U.S.C. §§ 363(*l*) and 541(c)(1)(B), and thereby harms thousands of Transcon's creditors, including thousands of former employees and their health, welfare, and pension benefit funds.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is published at 58 F.3d 1432 (9th Cir. 1995) (*"Transcon"*). The text of the *Transcon* opinion appears in Appendix A. *See* App. 1a. The order amending and denying rehearing of that opinion appears in Appendix B. *See* App. 22a. The decision of the United States District Court for the Central District of California is unreported. The transcript of the oral ruling of the District Court appears in Appendix C. *See* App. 24a. The judgment of the District Court appears in Appendix D. *See* App. 97a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals filed its opinion and judgment on July 10, 1995. *See* App. 1a. On July 21, 1995, the Trustee timely filed his petition for rehearing and suggestion for rehearing en banc. On September 14, 1995, the Ninth Circuit denied rehearing. *Id.* at 22a. The time to petition this Court for a writ of certiorari therefore extends through December 13, 1995. *See* Supreme Court Rules 13 (time for filing petition) and 30.1 (computation of time).

The Bankruptcy Court for the Central District of California had subject matter jurisdiction of the Trustee's adversary proceeding against Sterling Press under 28 U.S.C. §§ 157 and 1334, because the Trustee's claims for relief related to the bankruptcy case of Transcon. The District Court withdrew the reference from the Bankruptcy Court by stipulation and order filed February 25, 1994. Under 28 U.S.C. §§ 157(d) and 1334, the District Court thereby acquired jurisdiction of the Trustee's adversary proceeding.

The Ninth Circuit Court of Appeals also had jurisdiction. The District Court entered summary judgment for Sterling Press on March 29, 1994. *See* App. 97a. The Trustee timely filed his notice of appeal on March 30, 1994. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 of the Trustee's timely appeal under Fed.R.App.P. 6 (a) from the final judgment of the District Court exercising original jurisdiction under 28 U.S.C. § 1334.

The United States participated as *amicus curiae* in the proceedings below. A copy of this petition was served on the Solicitor General of the United States.

STATUTES INVOLVED

This proceeding involves interpretation of the anti-forfeiture provisions of §§ 363(*l*) and 541(c)(1)(B) of the Bankruptcy Code, 11 U.S.C. §§ 363(*l*), 541(c)(1)(B), and §§ 2 and 9 of the Negotiated Rates Act of 1993 ("Rates Act"), Pub.L. No. 103-180, 107 Stat. 2044-49, 2053 (partially codified at 49 U.S.C. § 10701(f)). Copies of those statutory provisions appear in Appendix E. *See* App. 100a. That appendix includes copies of related statutory provisions cited in this petition.

STATEMENT OF THE CASE

A. Transcon

Transcon was once one of the largest motor freight carriers in the United States. *See ICC v. Transcon Lines*, ___U.S.___, 115 S.Ct. 689, 130 L.Ed.2d 562 (1995). In 1990, Transcon permanently shut down, and all but two of Transcon's 3,800 employees lost their jobs. In May 1990, the health, welfare, and pension benefit funds of Transcon's former employees filed an involuntary bankruptcy petition against Transcon in the Bankruptcy Court for the Central District of California. In June 1990, the Bankruptcy Court appointed Leonard L. Gumport as trustee. He converted the case to a chapter 7 liquidation in July 1990.

B. Transcon's Bankruptcy Estate

The filing of Transcon's bankruptcy case created a bankruptcy estate that consisted of all property owned by Transcon as of the 1990 filing date. *See* 11 U.S.C. § 541(a); App. 104a. This bankruptcy estate included all causes of action of Transcon to recover "undercharges" from its former customers ("shippers") who paid Transcon less than the applicable shipping rates specified in Transcon's publicly filed tariffs. *See Transcon*, 58 F.3d at 1438; App. 15a ("Transcon's undercharge claims are 'property' for purposes of the Bankruptcy Code"); *see also In re Transcon Lines*, 147 B.R. 770, 772 (Bankr. C.D. Cal. 1992) ("Included in the property of the [Transcon] estate at the date of the petition were claims against former shippers for undercharges. . . . The primary asset of the Transcon Lines bankruptcy estate consists of those filed rate claims").

Although Transcon was no longer in business, 11 U.S.C. § 363(b) expressly authorized the Trustee to use Transcon's undercharges "other than in the ordinary course of business," subject to court approval. *See* App. 100a. In addition, 11 U.S.C. § 363(*l*), 541(c)(1)(B) protected the property of Transcon's estate against state or federal laws that sought to forfeit or modify that property based on the bankruptcy, insolvency, or "financial condition" of Transcon. *See Transcon*, 58 F.3d at 1438 ("It is also clear that federal statutes, like the Rates Act, constitute 'applicable nonbankruptcy law' within the meaning of section 541(c)(1) and 'applicable law' within the meaning of

section 363(*l*)"), *citing Patterson v. Shumate*, 504 U.S. 753, 757, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992); App. 15a.

Beginning in 1990, with Bankruptcy Court approval, the Trustee began to use Transcon's undercharges by collecting them through litigation and using the proceeds to pay creditors and professionals. The Trustee pursued those undercharges, because the Supreme Court had recently reaffirmed that a motor common carrier has both a right and a duty to collect undercharges owed by shippers. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ("*Maislin*").

C. The Rates Act

1. Hearings on the Proposed Rates Act

Following this Court's decision in *Maislin*, a three year legislative battle occurred in Congress between the House Committee on Public Works and Transportation, which sought to eliminate the undercharge claims of bankrupt motor carriers, and the House Committee on the Judiciary, which was sensitive to the rights of bankruptcy estates and their creditors. By reason of Rule X of the House of Representatives, the Judiciary Committee had legislative jurisdiction of any bill that would impair the rights of bankruptcy estates.[1] From 1990 through

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[1] Rule X of the Rules of the House of Representatives confers jurisdiction of proposed bankruptcy-related legislation on the Judiciary Committee. *See* App. 132a-34a (text of Rule X). Rule X gives the Judiciary Committee broad power to prevent enactment of bankruptcy-related legislation. *See, e.g., In re Weir*, 173 B.R. 682, 686 (Bankr. E.D. Cal. 1994) (describing how, in

1992, despite repeated efforts, the Public Works Committee was unable to draft a bill that would satisfy the Judiciary Committee. The year 1992 culminated in another legislative logjam, when, by letters dated September 22, 1992, the Chair of the Judiciary Committee notified both the Speaker of the House and the Chair of the Public Works Committee that the Judiciary Committee would invoke Rule X to assert jurisdiction of proposed legislation to limit the right of non-operating motor freight carriers to collect undercharges.[2] No such legislation passed in 1992.

In 1993, the legislative battle continued. In June 1993, the Subcommittee on Surface Transportation of the Public Works Committee conducted hearings on H.R. 2121, a bill that would limit the right of non-operating motor freight carriers to recover undercharges. *See The Negotiated Rates Issue and Proposed Legislative Solutions Thereto: Hearing Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, H.R.

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connection with other proposed legislation, the "House Judiciary Committee leaders . . . bottled up essentially all bankruptcy legislation for years. . . . ").

[2] In this September 22, 1992 letter, Mr. Jack Brooks, the Chair of the Judiciary Committee, wrote to Mr. Thomas S. Foley, the Speaker of the House, that: "This type of legislation implicates two separate areas of subject matter clearly within the House Judiciary Committee's Rule X jurisdiction: bankruptcy law and procedure and the proper division of adjudicatory responsibility between the courts and administrative agencies." *See* Appellant's Excerpts of Record, Vol. 3, p. 502, filed May 20, 1994 in Ninth Cir. No. 94-55425.

Doc. No. 103-18, 103d Cong., 1st Sess. (1993) ("*Hearings*"). As of June 1993, the text of proposed H.R. 2121 contained no exception for the rights of such bankrupt motor carriers as Transcon. *Hearings* at xliii-1xiv (text of H.R. 2121). In response, representatives of Transcon, its former employees, and their pension funds attended these hearings and opposed H.R. 2121. *See Hearings* at 148-61, 169-71. James Fox, the former chief financial officer of Transcon, testified:

> The freight undercharges that shippers want to keep are in part the proceeds of the obligations that Transcon Lines failed to meet to its employees, their benefit funds, the environment, and the creditors. All but two of Transcon Lines' 3,800 employees have lost their jobs at Transcon. The former employees and their pension funds are owed $77 million. They won't get paid, and neither will the taxes owed on those wages be paid if Congress limits Transcon's ability to recover freight undercharges owed to it. . . .
>
> Freight undercharges are the largest assets of the Transcon Lines[] bankruptcy estate. Monies owed Transcon range from $70 million to $160 million. . . .
>
> The uncollected undercharge represents 96 percent of Transcon's remaining assets. (*Hearings* at 170-71.)

Thomas Nyhan, general counsel to the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds, the largest multi-employer pension fund in the United States, also testified against H.R. 2121. *See Hearings* at 151-61, 366-76. After describing the funds and

their involvement in "hundreds and hundreds of active bankruptcies," he further testified on the importance of preserving undercharges as an asset of bankruptcy estates:

> The funds are currently owed over $175 million in health, pension and withdrawal liability. And, in many of these cases, the pension and health and welfare funds are one of the largest if not the largest creditor.
>
> Unfortunately for the most part, the funds will not collect [their] outstanding indebtedness unless the freight undercharge claims remain an asset of the estate. (*Hearings* at 151-52.)

Faced with this testimony[3] and the longstanding opposition of the Judiciary Committee, the Public Works Committee made a major legislative compromise, one that courts would later mistakenly conclude never occurred, despite the statutory language that documented this compromise. Specifically, in November 1993, the Public Works Committee amended H.R. 2121 by adding § 9 to the bill. *Compare* H.R. Rep. No. 359, 103d Cong., 1st Sess. 7, 13-17 (1993) *with Hearings* at xliii-1xiv. That § 9 expressly exempted the Bankruptcy Code and the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C.

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[3] In addition, during these hearings, union representatives submitted a study on the effect of de-regulation of motor carriers since 1980. The study showed that 140 motor carriers had shut down and that these carriers had formerly employed 175,022 persons. *Hearings* at 296-305. This study also showed that, of these 140 carriers, approximately 70 had filed bankruptcy. *Id.* at 297-304.

§ 1001 *et seq.*, from the scope of the bill. *See* H.R. Rep. No. 359, *supra*, at 13 ("Section 9 provides that nothing in this Act shall be construed as limiting or otherwise affecting applicability of title [11] U.S.C., relating to bankruptcy or the Employee Retirement Income Security Act of 1974"). The Public Works Committee explained that § 9 of the bill mooted the need to refer the bill to the Judiciary Committee, which had jurisdiction of bankruptcy legislation. H.R. Rep. No. 359, *supra*, at 16. The Chair of the Public Works Committee confirmed that: "we were able to agree on language clarifying that we do not intend in this legislation to affects [sic] either the Bankruptcy Code or the jurisdiction of the bankruptcy courts"). The Chair of the Public Works Committee repeated these assurances on the floor of the House when it voted to enact the bill. *See* 139 Cong. Rec. H 9603 (daily ed. Nov. 15, 1993) (Chair of Public Works Committee explains § 9 as follows: "we do not intend in this legislation to affect either the bankruptcy code or the jurisdiction of the bankruptcy courts").

Three days later, on November 18, 1993, the Senate substituted the text of H.R. 2121 for the text of S. 412 and voted to enact it. *See* 139 Cong. Rec. S 16183-87 (daily ed. Nov. 18, 1993). The President signed the Rates Act, including § 9, into law on December 3, 1993. 107 Stat. 2044, 2053.

By reason of the addition of § 9 to the proposed Rates Act in the closing days of the 103rd Congress, the amended bill was never referred to the Judiciary Committee for hearings on the bankruptcy ramifications of the bill, nor was the bill referred to the Labor Committee for hearings on the ramifications of the bill on the rights of

employees and their pension funds to obtain payment from shutdown employers. Because no such hearings occurred, the debate over the forfeiture provisions of § 2 of the bill continued without any attention being paid to the effect that the Bankruptcy Code and ERISA would now have.

2. Text of the Rates Act as Enacted

The Rates Act is a non-bankruptcy law that amends only title 49 of the United States Code, relating to transportation. 107 Stat. 2044. Section 9 of the Rates Act leaves no doubt that the Act neither limits nor affects the Bankruptcy Code. Section 9 provides:

> Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974. (107 Stat. at 2053; App. 131a-32a.)

Rates Act § 2(a), entitled "IN GENERAL," specifies that it amends 49 U.S.C. § 10701 and applies to a "motor carrier of property" that is "no longer transporting property." *See* Rates Act § 2(a) (codified at 49 U.S.C. § 10701(f)). "Motor carrier" is statutorily defined in 49 U.S.C. § 10102(13)-(15) to include only carriers that conduct transportation "for compensation." *See* App. 111a-12a. By definition, a motor carrier of freight "for compensation" that is no longer transporting freight is

certain to have one financial condition: a lack of revenue from the current transportation of freight.

The "IN GENERAL" provision of Rates Act § 2(a) further provides that, when a motor carrier subject to § 2(a) asserts an undercharge claim against a shipper, it may "elect to satisfy the claim under the provisions of paragraph (2), (3), or (4) of this subsection. . . . " 107 Stat. 2044; App. 113a. In turn, paragraphs (2)-(4) of Rates Act § 2(a) give shippers the option to satisfy the undercharge claim by paying between 5% or 20% of the amount of the undercharge. 107 Stat. 2045; App. 115a. In addition, paragraph 9 of Rates Act § 2(a) provides that "Notwithstanding paragraphs (2), (3), and (4)," a shipper that is a small business concern "shall not be liable" for any portion of the undercharge. 107 Stat. 2046; App. 118a.

D. Gumport, Trustee v. Sterling Press

1. Proceedings in Bankruptcy Court and District Court

On December 29, 1993, the Trustee filed a first amended complaint against a former Transcon shipper named Sterling Press. The Trustee sought to recover $28,269.61 in freight undercharges that Sterling Press received during 1987-90. The Trustee's adversary proceeding was entitled *Gumport, Trustee etc. v. Sterling Press* and was docketed in the Bankruptcy Court as Adv. No. SB 93-2917 DN. This proceeding was a test case to determine whether the Rates Act retroactively forfeited the Transcon estate's pre-existing causes of action to recover undercharges from approximately 2,000 shippers. By reason of the significance of this test case, the United States,

the ICC, and numerous shipper trade groups participated as *amici curiae*. App. 26a.

In February 1994, the Trustee and Sterling Press filed cross-motions for summary judgment. Sterling Press alleged that the 1993 enactment of § 2 of the Rates Act retroactively provided a complete defense to any undercharge liability. The Trustee alleged that the retroactive defenses provided by § 2 of the Rates Act were unenforceable by reason of the savings clause in § 9 of the Rates Act and the anti-forfeiture provisions of the §§ 363(*l*) and 541(c)(1)(B) of the Bankruptcy Code, 11 U.S.C. §§ 363(*l*), 541(c)(1)(B). Also in February 1994, the Trustee and Sterling Press stipulated to withdraw the reference to the district court under 28 U.S.C. § 157(d).

In connection with these cross-motions for summary judgment, the Trustee submitted a declaration from a certified public accountant. As the Ninth Circuit would later acknowledge, the Trustee established that the shutdown by a motor freight carrier of its freight transport operations necessarily related to the carrier's financial condition and would have to be disclosed on the carrier's financial statements. App. 18a.

On March 22, 1994, on cross-motions for summary judgment, U.S. District Judge Irving Hill granted summary judgment under § 2 of the Rates Act for Sterling Press and dismissed the Trustee's claims in their entirety. App. 24a. Judge Hill had two alternative bases for his ruling. First, notwithstanding the uncontroverted declaration of Transcon's accounting expert, Judge Hill ruled that the anti-forfeiture provisions of the Bankruptcy Code did not apply to § 2 of the Rates Act, because the non-

operating condition of a carrier is not a "financial condition" within the meaning of the anti-forfeiture provisions of the Bankruptcy Code. *See* App. 47a-51a, 88a. Second, notwithstanding § 9 of the Rates Act, Judge Hill ruled that § 2 of the Rates Act made "a pro tanto amendment of [the] Bankruptcy Act. . . . " *See* App. 52a, 88a.

2. Proceedings in Ninth Circuit

The Trustee thereafter filed an appeal to the Ninth Circuit, and it granted his request to expedite that appeal. The Ninth Circuit heard oral argument on October 6, 1994, and took the matter under submission until July of the following year. *See* App. 1a.

In the meantime, on April 14, 1995, the Eighth Circuit heard oral argument of a similar challenge to the Rates Act. On June 8, 1995, the Eighth Circuit issued its opinion upholding the Rates Act in *In re Jones Truck Lines, Inc.*, 57 F.3d 642 (8th Cir. 1995) ("*Jones*"). In rulings that the Ninth Circuit would later contradict, the Eighth Circuit concluded that § 9 of the Rates Act was "not so clear" in that the statutory words "limiting" and "affecting" were ambiguous (57 F.3d at 645), and further ruled that § 9 was merely "a response to concerns that portions of the [Rates Act] would transfer jurisdiction over bankrupt carriers to the ICC" (*id.* at 646). The Eighth Circuit arrived at this conclusion even though the provisions on bankruptcy jurisdiction appear in title 28, while Rates Act § 9 refers to both title 11 and title 28 (and ERISA). Among other things, the Eighth Circuit further concluded that a motor freight carrier's non-operating status was distinct from its financial condition, so that the anti-forfeiture provisions

of the Bankruptcy Code were not applicable in any event. *Id.* at 647-49.

On July 10, 1995, the Ninth Circuit filed its opinion in *Transcon*. App. 1a. The Ninth Circuit did not agree with the Eighth Circuit's views that the words "limiting" and "affecting" in Rates Act § 9 were ambiguous, nor that § 9 served the limited function of preventing the Rates Act from modifying the jurisdiction of bankruptcy courts. Instead, the Ninth Circuit ruled that § 9 of the Rates Act "is clear" and prevents "courts from construing the Rates Act as a pro tanto amendment of the Bankruptcy Code." App. 13a. Concluding that the words "limiting" and "affecting" in § 9 unmistakably mean "amending," the Ninth Circuit also refused to consider any of the legislative history of the battle to preserve undercharges as an asset of bankruptcy estates for payment of creditors, including employees and pension funds. App. 10a ("we refuse to look further than the face of the statute").

The Ninth Circuit also did not agree with the Eighth Circuit's view that non-operating status and financial condition were clearly distinct concepts. Instead, the Ninth Circuit stated:

> A motor carrier's cessation of operations necessarily has an effect on its financial condition and would certainly be reflected on its financial statements. (App. 18a.)

The Ninth Circuit went even further and stated that the terms "financial condition" subsumed the concept of operational status: "The term 'financial condition' represents a concept that is somewhat broader than operational status." App. 19a. The Ninth Circuit also determined that Rates Act

§ 2 inflicted a forfeiture of Transcon's undercharges (App. 15a), and that these undercharges were property of Transcon's bankruptcy estate (*id.*). Nevertheless, with the stated goal of avoiding "conflicts" between the forfeiture provisions of Rates Act § 2 and the anti-forfeiture provisions of the Bankruptcy Code (*id.* at 20a), the Ninth Circuit adopted an unprecedented definition of the terms "financial condition" in the Bankruptcy Code. Despite recognizing that other courts had indicated that a business shutdown could be a "financial condition" within the meaning of the Bankruptcy Code (*id.* at 19a),[4] the Ninth Circuit decided to limit the meaning of the words "financial condition" in the Bankruptcy Code. Invoking facts that the Seventh Circuit would later contradict, the Ninth Circuit explained that the motor freight industry has an "unusual nature" that makes a carrier's shutdown of its for-compensation freight transportation operations not part of the carrier's "financial condition":

> [B]ecause of the unusual nature of the motor freight industry that existed before the enactment of the [Rates Act], a motor common carrier's solvency or financial condition was not necessarily dependent upon the continuation of

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[4] *See also Blackwell v. Dabney*, 702 F.2d 490, 492 (4th Cir. 1983) (statements that a business "was growing" and "was striving" were statements concerning the "financial condition" of the debtor's business within the meaning of 11 U.S.C. § 523(a)(2)); *In re Mama D'Angelo, Inc.*, 55 F.3d 552, 555 (10th Cir. 1995) (in determining "financial condition" of a debtor within meaning of 11 U.S.C. § 101(32), "[i]t is well-settled that if a company is only nominally extant, to treat it as a going concern would be misleading and would fictionalize the company's true financial condition").

> operations. There are many former motor common carriers of freight, most notably A-Line, Ltd., that have remained solvent and financially healthy not by continuing their operations, but by turning to the lucrative business of suing their former customers. (App. 19a-20a.)

There was no evidence in the court record, or outside the record, that A-Line, or any other shutdown motor freight carrier, has "remained solvent and financially healthy not by continuing their operations, but by turning to the lucrative business of suing their former customers." Indeed, the public records of the Court of Common Pleas of Philadelphia County reflect that A-Line to this day has multiple unsatisfied judgments against it. *See, e.g.*, Case Nos. 920701244 ($158,447 owed to Lexington Insurance) and Case No. 901004250 ($15,349 owed to American President Lines).[5]

Shortly thereafter, the Seventh Circuit contradicted the above-quoted factual linchpin of the Ninth Circuit's opinion, *i.e.*, that there were "many" shutdown carriers that were "solvent and financially healthy" by means of suing their former customers for undercharges. *See Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 625 (7th Cir. 1995) ("*Lifschultz*"). Instead, the Seventh Circuit observed

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[5] The Ninth Circuit's mistake on this point resulted from incorrect assertions by Sterling Press in its brief and at oral argument that A-Line was solvent and financially healthy. *See* Ninth Circuit Brief of Appellee Sterling Press at pp. 14-15, filed June 15, 1994 ("A-Line was neither bankrupt nor insolvent"). On petition for rehearing, the Trustee specifically brought to the Ninth Circuit's attention that there was no basis for the assertion that A-Line, or any other non-operating carrier that was suing its former customers, was solvent or financially healthy.

that: "The class of carriers and claims treated by the Act is almost entirely comprised of bankrupt carriers." *Id.* at 625. The Seventh Circuit also contradicted the Ninth Circuit's ruling that § 9 was "clear" and plainly prevented the Rates Act from amending any provision of the Bankruptcy Code. The Seventh Circuit stated:

> Given the text of Section 9 and the legislative history of the [Rates Act], it is no surprise that courts have produced the wide variety of views concerning the proper construction of Section 9 and the effect of the [Rates Act] upon undercharge claims made by bankruptcy carriers.

Lifschultz, 63 F.3d at 627. The Seventh Circuit nevertheless upheld the forfeitures in Rates Act § 2 on the theories that § 9 had to be narrowly construed and that, in any event, Rates Act § 2(a)(9) was not conditioned on the non-operating status of the motor freight carrier. *See Lifschultz*, 63 F.3d at 627-32. Subsequently, the Fourth and Eleventh Circuits also upheld the forfeiture provisions in Rates Act § 2. *See In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995) (*"Bulldog"*); *In re Olympia Holding Corporation*, ___F.3d ___, 1995 WL 638414 (11th Cir. 1995) (*"Olympia"*).

E. Decision of Supreme Court in ICC v. Transcon

In 1995, this Court decided *ICC v. Transcon Lines*, ___U.S.___, 115 S.Ct. 689, 130 L.Ed.2d 562 (1995), a case that did not involve the Rates Act or the kind of undercharges sought by the Trustee from Sterling Press in this proceeding. In deciding that prior certiorari proceeding, this Court expressly refrained from addressing the issue

of the impact of the Rates Act on Transcon. *ICC v. Transcon*, 115 S.Ct. at 691.

REASONS FOR GRANTING THE WRIT

This case raises the issue whether the unqualified terms of the anti-forfeiture provisions of 11 U.S.C. §§ 363(*l*), 541(c)(1)(B) are subject to an exception for forfeitures triggered by the cessation of a debtor's revenue-generating business operations. This case also raises the issue whether Rates Act § 9, which prevents Rates Act § 2 from "affecting" or "limiting" either the Bankruptcy Code or ERISA, nevertheless permits Rates Act § 2 to forfeit assets that are property of a bankruptcy estate and that are needed to pay wage and pension claims entitled to priority under the Bankruptcy Code.

The issues raised are important. They involve the strong national policies, reflected in both Rates Act § 9 and ERISA, of protecting the integrity of pension funds and imposing pension withdrawal liability on an employer that shuts down its business. Also involved is the strong national policy, reflected in Rates Act § 9 and the Bankruptcy Code, of preventing disguised priorities that conflict with those specified by Congress in the Bankruptcy Code, including the priority of wage and pension claims against a business that shuts down. The circuit courts have undermined these policies by misinterpreting both Rates Act § 9 and 11 U.S.C. §§ 363(*l*), 541(c)(1)(B). In the *Transcon* case, the Ninth Circuit adopts rules that authorize the forfeiture of assets needed to pay the priority claims of thousands of former employees of

bankrupt motor carriers and their health, welfare, and pension funds, including $175,000,000 owed to the largest multi-employer pension fund in the United States. The Ninth Circuit creates an absurd statutory scheme that undermines Rates Act § 9, ERISA, and the Bankruptcy Code by making a business shutdown trigger the forfeiture of the assets that the business needs to satisfy the priority wage and pension claims that are triggered by the shutdown. The Ninth Circuit's judicially implied exception to the anti-forfeiture laws exposes all debtors to similar forfeitures in the future.

In upholding the forfeitures in Rates Act § 2, the circuit courts state conflicting rules that substitute judicial preferences for the legislative compromises duly enacted by Congress. The circuit courts either incorrectly limit Rates Act § 9 to permit the forfeiture provisions of Rates Act § 2 to trump the anti-forfeiture provisions of the Bankruptcy Code, or, alternatively, the circuit courts incorrectly limit those provisions of the Bankruptcy Code by misdefining the words "financial condition."

A. THE NINTH CIRCUIT'S OPINION RAISES IMPORTANT FEDERAL ISSUES THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

The anti-forfeiture provisions of 11 U.S.C. §§ 363(*l*), 541(c)(1)(B) protect each and every debtor in bankruptcy from the enforcement of any contract, lease, or non-bankruptcy statute that forfeits or modifies property of the

debtor based on its bankruptcy, insolvency, or "financial condition." *See* App. 101a, 106a-07a. These unqualified statutory provisions empower and command courts to prevent forfeitures of a debtor's property when it may be needed to pay creditors. This Court has not previously interpreted these provisions. They were enacted as part of the Bankruptcy Reform Act of 1978, Pub.L.No. 95-598, 92 Stat. 2549, after this Court reluctantly upheld a forfeiture under pre-Code law in *Finn v. Meighan*, 325 U.S. 300, 65 S.Ct. 1147, 89 L.Ed. 1624 (1945).

The Ninth Circuit guts the anti-forfeiture provisions by ruling that a forfeiture triggered by the shutdown of the revenue-generating transport operations of a motor freight carrier is not a forfeiture triggered by the "financial condition" of the carrier within the meaning of 11 U.S.C. §§ 363(*l*) and 541(c)(1)(B). The Ninth Circuit arrives at this result while acknowledging that: "A motor carrier's cessation of operations necessarily has an effect on its financial condition and would certainly be reflected on its financial statements." *Transcon*, 58 F.3d at 1439; App. 18a. Forfeitures in leases, contracts, and non-bankruptcy laws are now valid even when they are specifically conditioned on a characteristic of the debtor that necessarily has an effect on its financial condition and would certainly be disclosed on its financial statements.

The Ninth Circuit creates a contradictory statutory scheme that undermines federal labor, pension, and bankruptcy laws and defeats the statutory rights of employees and their health, welfare, and pension funds. Paragraphs (3) and (4) of § 507(a) of the Bankruptcy Code, 11 U.S.C. § 507(a)(3)-(4), expressly grant priority to wage and pension claims that arise within 90 days of the earlier of a

debtor's bankruptcy or "the date of the cessation of the debtor's business." 11 U.S.C. § 507(a)(3)-(4); App. 103a. Congress thereby unequivocally stated its intent to protect the wage and pension claims of the employees of a business that shuts down. By concluding that a motor freight carrier's business shutdown is not a "financial condition," the Ninth Circuit creates a statutory scheme that provides, when a motor freight carrier shuts down, that: (1) its employees and their pension funds acquire priority claims, but (2) the same shutdown also triggers a valid forfeiture of assets of the shutdown company. This result means thousands of former employees of bankrupt motor carriers will not get their priority wage claims paid, and the largest multi-employer pension fund in the United States will not obtain payment from bankrupt motor carriers on its pending claims for $175,000,000. *See Hearings* at 148-61, 169-71.

In failing to consider these facts, the Ninth Circuit disregards the strong federal policy of protecting employees and their pension funds against economic losses caused by the business shutdown of an employer. *See, e.g.*, Worker Adjustment and Retraining Notification Act of 1988 ("WARN Act"), Pub.L.No. 100-379, 102 Stat. 890 (codified at 29 U.S.C. §§ 2101-2109) (requiring employers to give employees advance notice of plant closings and subjecting employers to damages for a shutdown without adequate notice); Multiemployer Pension Plan Amendments Act of 1980 ("MPPA"), Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1461) (imposing pension fund withdrawal liability on

employers that cease covered business operations)[6]; *see also* 11 U.S.C. § 507(a)(3)-(4) (priority in bankruptcy for wage and pension claims arising from the earlier of bankruptcy or the "cessation of operations").

Rates Act § 9 prohibited the Ninth Circuit from ignoring the harm inflicted by forfeiting the primary asset that Transcon and other bankrupt motor carriers need to pay priority wage and pension claims. *See Hearings* at 150-51, 169-71. Section 9 of the Rates Act expressly provides that the Act shall not be construed as "limiting" or "affecting . . . the Employee Retirement Security Act of 1974." 107 Stat. 2053. The MPPA is contained in Subchapter I of the ERISA. In enacting ERISA, Congress emphatically stated that the need to protect the "well-being and security of millions of employees" makes employee benefit plans "affected with the national public interest. . . . " 29 U.S.C. § 1001(a); App. 110a.

The Ninth Circuit's misinterpretation of the words "financial condition" also has the absurd and harmful result of authorizing the kind of statutory lien that Congress sought to prohibit, and has consistently prohibited, since 1966. In that year, Congress amended the predecessor of the Bankruptcy Code to bar liens that first

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[6] Under 29 U.S.C. §§ 1382-83, an employer that "ceases covered operations" triggers withdrawal liability to its employees' pension fund. *See, e.g., Santa Fe Pacific v. Central States Pension Fund*, 22 F.3d 725 (7th Cir. 1994) (describing scheme by corporation to avoid a shutdown that would trigger pension fund withdrawal liability under MPPA) (Posner, J.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 483, 130 L.Ed.2d 396 (1994).

become effective against a debtor's property upon the debtor's insolvency "or liquidation" (*i.e.*, shutdown). *See* Bankruptcy Act § 67(c)(1)(A), Pub.L. No. 89-495, 80 Stat. 268, 11 U.S.C. § 107(c) (repealed 1979). Congress banned such statutory liens on the theory that they operate as "clearly a disguised priority." S. Rep. No. 1159, 89th Cong., 2d Sess. at 6, *reprinted in* 1966 U.S.C.C.A.N. 2456, 2461. Section 545(1)(E) of the Bankruptcy Code, 11 U.S.C. § 545(1)(E), continues to ban statutory liens that first become effective upon the debtor's having a specified "financial condition," and one of the principal drafters of the Code contemporaneously wrote that this term was meant to include the condition of being in liquidation. *See* R. Levin, *An Introduction to the Trustee's Avoiding Powers*, 53 Am. Bankr.L.J. 173, 178 (1979) ("The new Bankruptcy Code is no less harsh on statutory liens. . . . The test preventing springing statutory liens that arise on the debtor's insolvency or liquidation is retained and expanded"). By redefining "financial condition" to exclude the condition of being "in liquidation," the Ninth Circuit judicially nullifies § 545(1)(E). As a result, Rates Act § 2 operates as a disguised priority in that it alters the priorities of 11 U.S.C. § 507(a)(3)-(4) to provide that shippers have greater rights in undercharges belonging to the bankruptcy estate of a non-operating motor carrier than its former employees and their pension funds.

The decision of the Ninth Circuit also inflicts unlawful forfeitures on the bankruptcy estates of debtors who are not motor carriers, even though the Ninth Circuit denies that this will happen. App. 18a-19a. The Ninth Circuit attempts to limit its opinion to motor carriers by

stressing the following supposedly "unusual" characteristic of the motor freight industry: a "motor common carrier's solvency or financial condition [is] not necessarily dependent upon the continuation of operations." App. 19a-20a. The Ninth Circuit disregards that every kind of business shares this supposedly unusual characteristic. If the anti-forfeiture provisions of the Bankruptcy Code are to have any significance, they cannot mean that a forfeiture tied to a business shutdown is valid if it is conceivable that a shutdown is consistent with financial health. Each and every kind of business may conceivably shut down for reasons having nothing to do with its financial health: the owners of a widget factory or widget store may take their profits and retire, or shut down and liquidate their assets to redeploy them to even more profitable pursuits. Because the supposedly "unusual" characteristics that the Ninth Circuit attributes to the motor freight industry are universal, the *Transcon* opinion, while denying that it has this result, authorizes lenders, lessors, and government agencies in every kind of business to insert and enforce *"Transcon"* forfeiture clauses in every loan agreement, contract, license, and permit.

B. THERE ARE CONFLICTS AMONG THE CIRCUITS ON THE MEANING OF RATES ACT § 9 AND THE WORDS "FINANCIAL CONDITION" IN THE BANKRUPTCY CODE

To achieve the superficially consistent result of enforcing forfeitures under Rates Act § 2, the circuit courts adopt conflicting interpretations of both Rates Act § 9 and the words "financial condition" in the Bankruptcy

Code as described below. Because the Rates Act has multiple sections, the conflicting definitions of Rates Act § 9 will continue to breed litigation and uncertainty about the scope of the Act. As a result of the Ninth Circuit's new definition of the words "financial condition" in the Bankruptcy Code, courts throughout the country will have to contend with the multiple meanings now ascribed to those words by circuit courts.

1. Meaning of Terms "Financial Condition" in the Bankruptcy Code

Eighth Circuit: According to the Eighth Circuit in *Jones*, a debtor's non-operational condition is separate and distinct from its "financial condition" as those terms are used in the Bankruptcy Code. "Jones argues that the [Rates Act's] reference to carriers no longer transporting property in reality turns on a carrier's financial condition and therefore the [Bankruptcy Code] sections block application of the [Rates Act]. There is no reason to question the plain meaning of the language used by Congress, however. The distinction between operating and non-operating carriers is a sensible one that furthers the [Rates Act's] purpose." *Jones*, 57 F.3d at 649. Thus, in the Eighth Circuit, it is apparent that forfeitures triggered by a debtor's business shutdown are always valid and are not forfeitures conditioned upon the debtor's "financial condition" as those terms are used in the Bankruptcy Code.

Ninth Circuit: According to the Ninth Circuit in *Transcon*, a debtor's "financial condition" in fact includes its operational condition: "The term 'financial condition'

represents a concept that is somewhat broader than operational status." *Transcon*, 58 F.3d at 1440; App. 19a. Further, the Ninth Circuit acknowledges that the non-operational status of a debtor "necessarily has an effect on [the debtor's] financial condition and would certainly be reflected on [the debtor's] financial statements." *Transcon*, 58 F.3d at 1439; App. 18a. According to the Ninth Circuit, a debtor's non-operating condition is separate from the debtor's "financial condition" *only* when the debtor has an "unusual nature" such that its "solvency or financial condition [is] not necessarily dependent upon the continuation of operations." *Transcon*, 58 F.3d at 1440; App. 19a-20a. The Ninth Circuit emphasizes that its opinion will not permit forfeitures of the assets of debtors that do not have this purportedly "unusual nature." *Id.* Thus, in the Ninth Circuit, the words "financial condition" include business shutdowns, except for those in the motor freight and similar industries.

Tenth Circuit: The Tenth Circuit, in a case not involving the Rates Act, recognized that the condition of no longer being a going concern is clearly part of a debtor's "financial condition" as those terms are used in the Bankruptcy Code. *In re Mama D'Angelo, Inc.*, 55 F.3d 552, 555 (10th Cir. 1995) (it was important to determine whether the debtor was a "going concern" in order to decide whether debtor had a "financial condition" that was "insolvent" within the meaning of § 101(32) of the Bankruptcy Code, 11 U.S.C. §§ 101(32)[7], because "[i]t is well-

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[7] "[A] word is presumed to have the same meaning in all subsections of the same statute. . . . " *Patterson v. Shumate, supra*, 112 S.Ct. at 2247 n. 2 (interpreting 11 U.S.C. § 541), *quoting*

settled that if a company is only nominally extant, to treat it as a going concern would be misleading, and would fictionalize the company's true financial condition").

2. Meaning of Rates Act § 9

Seventh Circuit: "Section 9 of the [Rates Act] is susceptible to two interpretations." *Lifschultz*, 63 F.3d at 625. "Given the text of Section 9 and the legislative history of the [Rates Act], it is no surprise that courts have produced [a] wide variety of views concerning the proper construction of Section 9 and the effect of the [Rates Act] upon undercharge claims made by bankrupt carriers." *Id.* at 627. The Seventh Circuit applied the "specific statutory provisions" of Rates Act § 2 in preference to the "general savings clause" of Rates Act § 9. *Id.* at 629. The Seventh Circuit acknowledged the need to avoid a "direct" conflict with the Bankruptcy Code. *Id.* at 627. However, in concluding that § 9 is merely a "general" savings clause and that the provisions of § 2 are more "specific" and therefore are entitled to greater weight, the Seventh Circuit limited the Bankruptcy Code and ERISA. Under the Seventh Circuit's approach, there will never be a direct conflict between the Rates Act and either the Bankruptcy Code or ERISA, because only the Rates Act specifically deals with motor carriers. The Seventh Circuit adopted a result-oriented approach by stressing that "a broad reading of Section 9's reference to the application of the

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Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 633, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

Bankruptcy Code will all but eviscerate the [Rates Act]." *Id.* at 629.

Eighth Circuit: The Eighth Circuit concluded that Rates Act § 9 merely prevents the Rates Act from amending the jurisdiction of bankruptcy courts, even though such jurisdictional provisions appear in title 28, not title 11. According to the Eighth Circuit, § 9 is merely "a response to concerns that portions of the [Rates Act] would transfer jurisdiction over bankrupt carriers to the ICC." *Jones*, 57 F.3d at 646. The Eighth Circuit insisted that ambiguities in § 9 and its legislative history support this interpretation. *Id.* at 645-47.

Ninth Circuit: Unlike the Seventh and Eighth circuits, the Ninth Circuit held that § 9 is unambiguous and declined to take the position that § 9 merely applies to title 28, or that the more specific provisions of Rates Act § 2 control over the general provisions of § 9. "The meaning of this section is clear. It is to prevent courts from construing the [Rates Act] as a pro tanto amendment of the Bankruptcy Code." *Transcon*, 58 F.3d at 1438; App. 13a. Nevertheless, the Ninth Circuit used Rates Act § 2 to justify a narrow interpretation of the Bankruptcy Code in order "to reconcile potential conflicts. . . . " *Transcon*, 58 F.3d at 1440; App. 20a. This interpretive approach violated the command of Rates Act § 9 that the Act shall not be construed to limit the Bankruptcy Code.

3. Meaning of Rates Act § 2(a)(9)

The Ninth Circuit expressly declined to decide whether Rates Act § 2(a)(9) forfeits the claims of both

operating and non-operating carriers against shippers that are small business concerns. *See* App. 21a ("We express no opinion on the question of whether section 2(a)(9) applies only to carriers that are no longer transporting property"). That issue therefore is not before this Court. Courts are currently divided on this issue. *Compare In re American Freight System, Inc.*, 185 B.R. 345, 352 (Bankr. D. Kans. 1995) ("The overall structure of § 10701(f) leads this Court to believe it is more reasonable to read paragraph (9) as applying only if the paragraph (1) showings are made") *with Lifschultz*, 63 F.3d at 630 ("we conclude that the conditions set forth in (f)(1)(A) do not apply to subsection (f)(9)"). Should the Court choose to review this issue, we would show that applying § 2(a)(9) to operating carriers is inconsistent with the express "IN GENERAL" language of Rates Act § 2(a)(1), renders the "Notwithstanding" clause of § 2(a)(9) surplusage, and disregards the legislative history of that provision, which shows that it was only intended to deal with the claims of non-operating carriers and that no legislator ever once stated that § 2(a)(9) would apply even if the carrier was operating.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: December 13, 1995

Respectfully submitted,

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APPENDIX A

PUBLISHED OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [PUBLISHED AT 58 F.3d 1432]

APPENDIX A

58 F.3d 1432 (9th Cir. 1995)

In re TRANSCON LINES, Debtor.

Leonard L. GUMPORT, Trustee of the Bankruptcy Estate of Transcon Lines, Plaintiff-Appellant,

v.

STERLING PRESS, Defendant-Appellee.

No. 94-55425

United States Court of Appeals,
Ninth Circuit

Argued and Submitted October 6, 1994.

Decided July 10, 1995

As Amended on Denial of Rehearing and Suggestion for Rehearing
En Banc September 14, 1995.

Chapter 7 trustee of estate of debtor-motor common carrier sued former customer, which was small business concern, to collect undercharges. The United States District Court for the Central District of California, Irving Hill, J., entered summary judgment in favor of customer, and trustee appealed. The Court of Appeals, Wallace, Chief Judge, held that: (1) plain language of Negotiated Rates Act (NRA) prohibited construction of NRA to limit or affect application of Bankruptcy Code, and (2) section of NRA providing shippers with defenses to undercharge claims was not conditioned on insolvency or financial condition of debtor and, thus, did not conflict with anti-forfeiture provisions of Bankruptcy Code, so NRA was applicable to undercharge claim.

Affirmed.

COUNSEL

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Daniel J. Sweeney, McCarthy, Sweeney & Harkaway, Washington, D.C.; Richard H. Streeter, Barnes & Thornburg, Washington, D.C., for defendant-appellee and amici curiae National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc.

Beth E. Cook, United States Department of Justice, Washington, D.C., for amicus curiae United States of America.

Frederic L. Wood, Donelan, Cleary, Wood & Maser, Washington, D.C., for amici curiae The National Industrial Transportation League and The Transportation Claims and Prevention Council.

Robert W. Baker, Halfpenny, Hahn, Roche & Marchese, Chicago, Illinois, for amicus curiae National Association of Wholesaler-Distributors.

Appeal from the United States District Court for the Central District of California

Before: WALLACE, Chief Judge, REINHARDT and BRUNETTI, Circuit Judges.

OPINION

WALLACE, Chief Judge:

Gumport, in his capacity as trustee of the bankruptcy estate of Transcon Lines (Transcon), appeals from the district court's summary judgment in favor of Sterling Press (Sterling). The determinative issue in this case is whether certain antiforfeiture provisions of the Bankruptcy Code, 11 U.S.C. §§ 363(l) and 541(c)(1)(B), prohibit the application of section 2 of the Negotiated Rates Act of 1993 (Rates Act), Pub. L. No. 103-180, 107 Stat. 2044 (partially codified at 49 U.S.C. § 10701(f)), to a nonoperating motor carrier of freight in bankruptcy. The district court answered this question in the negative. It had jurisdiction pursuant to 28 U.S.C. § 1334. We have jurisdiction over this timely appeal under 28 U.S.C. § 1291. We affirm.

I

The operative facts of this case are not in dispute. Transcon was a motor common carrier of freight that provided transportation for compensation in interstate commerce. Transcon became a Chapter 7 debtor in bankruptcy in 1990 and is no longer transporting property. Sterling is a former customer of Transcon that shipped freight with Transcon in interstate commerce from May 21, 1987, to May 1, 1990, prior to Transcon's bankruptcy filing. Gumport sued to collect $ 28,269.61 for transportation provided by Transcon for Sterling, an amount in addition to the charges originally billed to Sterling and collected by Transcon. This sum represents the difference between the amount actually charged by Transcon and

the amount due under the tariff filed by Transcon with the Interstate Commerce Commission (Commission).

The parties stipulated that Sterling qualifies as a "small-business concern" as defined by the Small Business Act, 15 U.S.C. § 632. They further stipulated that the rate offered to Sterling by Transcon was a "negotiated rate" as that term is defined in section 2(e)(6)(B) of the Rates Act.

II

At the time Transcon shipped property for Sterling, the Interstate Commerce Act (Commerce Act) prohibited motor common carriers of freight (i.e., trucking companies) from charging more or less than the rates contained in tariffs properly filed with the Commission. 49 U.S.C. §§ 10761(a), 10762(a). Although the Trucking Industry Regulatory Reform Act of 1994 (Reform Act), Pub. L. No. 103-311, §§ 201-212, 108 Stat. 1683, appears to amend the Commerce Act to repeal prospectively the "filed rate doctrine" altogether and make it impossible for motor carriers of property to collect undercharge claims regardless of whether they are still transporting property, the undercharge claims at issue here are not affected by the Reform Act. Section 206(e)(j) of the Reform Act specifically provides that "nothing in this section shall affect the application of the provisions of the [Rates Act] . . . to undercharge claims for transportation provided prior to the date of enactment of [the Reform Act]." This language is clear and unambiguous. The Commission apparently agrees. *See Twin Modal, Inc. – Petition For Declaratory Order – Agreements For Contract Carriage*, No. MC-C-30178 (Sept. 12, 1994) at n.2. Because the undercharge claims at

issue here all relate to transportation provided before its enactment on August 26, 1994, the Reform Act does not apply. We express no opinion concerning the effect of the Reform Act on undercharge claims that relate to transportation provided after its enactment.

Sterling and amici explain that motor common carriers frequently negotiate discounted rates with shippers that differ from the rates contained in tariffs filed by the carrier with the Commission. When carriers become bankrupt or otherwise cease their operations, they lose the incentive to maintain goodwill with shippers, and may sue to collect "undercharges" – the difference between the tariff rate and the amount actually charged – under the "filed rate doctrine." Although the Commission sought to alleviate this problem by declaring the practice of attempting to collect the filed rate after negotiating a lower rate an unreasonable practice, the Supreme Court invalidated the Commission's negotiated rates policy as inconsistent with the Commerce Act. *Maislin Indus. U.S. v. Primary Steel*, 497 U.S. 116, 130, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990). The Court explained that, "if strict adherence to §§ 10761 and 10762 [of the Commerce Act] as embodied in the filed rate doctrine has become an anachronism in the wake of the [Motor Carrier Act of 1980 (which deregulated the industry)] it is the responsibility of Congress to modify or eliminate these sections." *Id.* at 136. Congress eventually responded by passing the Rates Act.

Section 2 of the Rates Act provides shippers with certain defenses to undercharge claims. Under section 2(a)(2), claims involving shipments weighing 10,000 pounds or less can be satisfied by payment of 20% of the

undercharge. 49 U.S.C. § 10701(f)(2). Under section 2(a)(3), claims involving shipments weighing more than 10,000 pounds can be satisfied by payment of 15% of the undercharge. 49 U.S.C. § 10701(f)(3). Under section 2(a)(4), claims involving public warehousemen can be satisfied by payment of 5% of the undercharge. Finally, under section 2(a)(9), "small-business concerns" (such as Sterling) and certain other entities are completely relieved of any and all liability for undercharges. 49 U.S.C. § 10701(f)(9). Moreover, section 2(e) makes it an "unreasonable practice" for a carrier to attempt to collect more than the negotiated rate for transportation provided prior to September 30, 1990. This applies to all of Sterling's shipments.

Sections 2(a)(2), (3), (4), and 2(e) expressly apply, however, only to claims made by a carrier that "is no longer transporting property" or is transporting property "for the purpose of avoiding the application of [sections 2(a) or 2(e)]." 49 U.S.C. § 10701(f)(1)(A) (Rates Act § 2(a)(1)); Rates Act § 2(e)(1) (same).

In considering these section 2 provisions, however, some courts have concluded that section 2(a)(9), 49 U.S.C. § 10701(f)(9), completely frees small-business concerns and certain other entities of any and all liability for undercharge claims, regardless of whether the carrier is no longer transporting property. *See, Jones Truck Lines v. Whittier Wood Prods. Co. (In re Jones Truck Lines)*, 57 F.3d 642, 647, (8th Cir. 1995) (*Whittier*); *North Penn Transfer v. Polykote Corp.*, 170 Bankr. 565, 567 (Bankr. E.D. Pa. 1994) (*Polykote*); *Hoarty v. Midwest Carriers Corp. (In re Best Refrigerated Express)*, 168 Bankr. 978, 984-85 (Bankr. D. Nebr. 1994). These courts have reasoned that since section

2(a)(1), 49 U.S.C. § 10701(f)(1), which contains the requirement that the carrier no longer be transporting property, refers only to subsections (2), (3), and (4), and not to section 2(a)(9), section 2(a)(9) must apply regardless of whether the carrier is no longer transporting property. Although one might think that the omission of any reference to section 2(a)(9) in section 2(a)(1) was but an unintended error in drafting the legislation, the court in *Hoarty* correctly pointed out that section 2(a)(7) contains a reference to section 2(a)(9) as well as to sections 2(a)(2), (3), and (4). The obvious implication is that if Congress was alert enough to include a reference to section 2(a)(9) in section 2(a)(7), it was also alert enough to include such a reference in section 2(a)(1) if it intended small businesses and other entities protected by section 2(a)(9) to be required to make the showing demanded by section 2(a)(1).

Although we appreciate the analysis of this issue in *Whittier, Hoarty,* and *Polykote,* the question has not been addressed extensively in the briefs filed in this appeal. Indeed, Sterling has not addressed the argument at all. We need not reach this issue, however, if we conclude that conditioning the application of section 2 on a motor carrier's nonoperational status is not, in the unique context of the motor freight industry, equivalent to conditioning it on the insolvency or financial condition of the debtor. Thus, we would not need to decide whether section 2(a)(9) applies only to motor carriers that are no longer transporting property. In either case, the Bankruptcy Code's antiforfeiture provisions would not preclude its application. We now turn to that question.

III

Sterling invoked both section 2(a) (restrictions on collections) and section 2(e) (time limits) in defense against Transcon's undercharge claim. Transcon countered, however, that sections 2(a) and 2(e) do not apply to Transcon due to the protections afforded it under the antiforfeiture provisions of the Bankruptcy Code, 11 U.S.C. §§ 362(l) and 541(c)(1)(B).

Section 363(l) provides:

> The trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, *notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor,* on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that *effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.*

11 U.S.C. § 363(l) (emphasis added). Similarly, section 541(c)(1) states:

> An interest of the debtor in property becomes property of the estate . . . *notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law . . . that is conditioned on the insolvency or financial condition of the debtor,* on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and

> that *effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.*

11 U.S.C. § 541(c)(1) (emphasis added).

Transcon contends that the undercharge claims are property for purposes of the Bankruptcy Code and that, under the antiforfeiture provisions quoted above, sections 2(a) and 2(e) of the Rates Act cannot be applied to Transcon. The district court granted summary judgment for Sterling after concluding that section 2 of the Rates Act applies to Transcon's claims notwithstanding the relevant provisions of the Bankruptcy Code.

IV

The district court's summary judgment is reviewed de novo. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). When reviewing a district court's summary judgment, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* Because the facts of this case are not in dispute, our inquiry is limited to a de novo review of the district court's legal conclusion.

Three arguments have been advanced in support of Sterling's contention that section 2 applies to Transcon's undercharge claim irrespective of the Bankruptcy Code's antiforfeiture provisions. First, it has been suggested that even if section 2 does come within the scope of the Bankruptcy Code's antiforfeiture provisions, it would

merely constitute a pro tanto amendment of the Bankruptcy Code. Second, Sterling argues that even if section 2 is conditioned on the "insolvency or financial condition" of the carrier, it is nonetheless outside the scope of the antiforfeiture provisions because section 2 does not prevent property from coming into the hands of the bankruptcy estate but merely defines the scope of the property right in the first place. Finally, it is argued that conditioning section 2 on the operational status of the carrier is not the same as conditioning it on the carrier's financial condition. We address each of these contentions.

A.

We first address the contention that the Rates Act could amend the Bankruptcy Code. Section 9 of the Rates Act, which is captioned "Limitation on Statutory Construction," provides that, "nothing in this Act . . . shall be construed as limiting or otherwise affecting the application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974."

Although the parties argue extensively over the proper interpretation of the relevant legislative history, we refuse to look further than the face of the statute. By its express terms, section 9 states that the Rates Act "shall not be construed as limiting or otherwise affecting" the application of the Bankruptcy Code. Because this language unambiguously precludes us from interpreting the Rates Act as amending the Bankruptcy Code and does

not produce a patently absurd result, we cannot resort to an examination of the relevant legislative history. *Nugget Hydroelectric v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 433 (9th Cir. 1992), *cert. denied*, 124 L. Ed. 2d 247, 113 S. Ct. 2336 (1993).

It has been argued both that the meaning of section 9 is not clear and unambiguous and that to give section 9 its plain meaning would produce a patently absurd result in that it would frustrate the application of the principal operative provisions of the Rates Act. Our response is based, in part, upon *Nugget Hydroelectric*, where we were faced with a remarkably similar problem of statutory construction. We were forced to decide whether the Public Utility Regulatory Policies Act of 1978 (Policies Act) preempted the state action doctrine with respect to gas and electric utilities. *Id.* One provision of the Policies Act provided that "nothing in this Act or in any amendment made by this Act affects . . . the applicability of the antitrust laws to any electric utility or gas utility." *Id., quoting* 16 U.S.C. § 2603(l). Nugget argued that the term "antitrust laws" referred only to statutory law and not to the common law state action doctrine. It also argued that the statute was ambiguous and that the legislative history revealed that Congress clearly intended the Policies Act to preempt the state action doctrine. *Id.* We held that the language of the statute was clear, that it precluded us from holding that Policies Act preempted the state action doctrine, and that it did not produce an absurd result. *See id.* Therefore, we refused to look any further than the face of the statute.

The approach taken in *Nugget Hydroelectric* is the correct one to take in this case as well. As the Supreme

Court has explained: "In interpreting a statute a court should always turn to one cardinal canon before all others. . . . Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992). Indeed, "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (citations omitted).

Some of the bankruptcy courts that have addressed this issue have refused to give section 9 its plain meaning on the ground that the legislative history shows that the fundamental objective or "plain purpose" of the statute was to eliminate the problem of undercharge claims filed by bankrupt carriers. These courts have reasoned that if section 9 were given its obvious meaning, they would be forced "to sanction the absurd position that Congress only intended the statute to apply to carriers that are 'no longer transporting property,' but that have not filed for bankruptcy." *Jones Truck Lines v. Grinnell Corp.*, 167 Bankr. 488, 493 (N.D. Ill. 1994) (Grinnell).

Although it may be clear that the fundamental problem section 2 was designed to remedy was the filing of undercharge claims by bankrupt motor carriers, it is inappropriate for a court to invoke the "broad purpose" of a statute to invalidate specific provisions. As the Supreme Court has explained:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the legislative problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous

> in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74, 88 L. Ed. 2d 691, 106 S. Ct. 681 (1986).

Section 9 contains broad language which prohibits any construction of the Rates Act which would have the effect of "limiting" or "affecting" the application of the Bankruptcy Code. The meaning of this section is clear. It is to prevent courts from construing the Rates Act as a pro tanto amendment of the Bankruptcy Code. As one court has explained: "Section 9 of the [Rates Act] merely provides that if a conflict exists between the [Rates Act] and the Bankruptcy Code, then the Code takes precedence." *De'Medici v. FDSI Mgmt. Corp. (In re Lifschultz Fast Freight Corp.)*, 174 Bankr. 271, 278 (N.D. Ill. 1994).

B.

We now address the argument that section 2 of the Rates Act is outside the scope of the antiforfeiture provisions of the Bankruptcy Code even if it is "conditioned on the insolvency or financial condition of the debtor" because it does not prevent property from coming into the bankruptcy estate.

In support of this argument, Sterling relies on our opinion in *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986). *Farmers Markets*, however, is easily distinguishable. There, California Business and Professions Code § 24049 prohibited *all* holders of liquor licenses from transferring their licenses until certain state taxes had been paid. *See id.* at 1401. Several liquor license holders in bankruptcy attempted to sell their licenses without paying the relevant taxes. *Id.* We held that section 541(c)(1) of the Bankruptcy Code did not preclude the enforcement of section 24049 against a debtor in bankruptcy, and that a bankrupt holder of such a license, just like any other holder of the same type license, could not sell it without paying the relevant tax. *Id.* at 1402-04. We reasoned that since the property rights of a holder of a liquor license were limited by section 24049 before the filing of a bankruptcy petition, section 24049 did not operate to prevent property from coming into the hands of the bankruptcy estate. *Id.* at 1402-03.

In *Farmers Markets*, section 24049 applied to *all* holders of liquor licenses. Here, the situation is different. Sections 2(a) and 2(e) of the Rates Act do not apply to all motor carriers of freight. If they did, sections 2(a) and 2(e) would simply modify the property rights of all holders of undercharge claims and the Bankruptcy Code would clearly be irrelevant. However, because these sections apply only to carriers of freight that are no longer transporting property, they arguably effect a forfeiture of property that is conditioned on the debtor's financial condition.

It is true that nonbankruptcy law defines the nature, scope, and extent of the property rights that come into

the hands of the bankruptcy estate. *Id.* at 1402. But that is because nonbankruptcy law defines the nature of property rights in the absence of bankruptcy, and only those property rights which are owned by the debtor become the bankruptcy estate. Thus, *Farmers Markets* stands for the proposition that section 541(c)(1) does not increase a debtor's property rights, but merely preserves them.

While Sterling correctly points out that section 541(c)(1)(B) acts to ensure that all property of the debtor becomes property of the bankruptcy estate upon the filing of the bankruptcy case, Sterling fails to mention that section 363(l) protects the "use" of such property once it is in the hands of the bankruptcy estate.

Transcon's undercharge claims are "property" for purposes of the Bankruptcy Code. *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 707 (9th Cir. 1986) (causes of action are "property" protected by section 541). It is also clear that federal statutes, like the Rates Act, constitute "applicable nonbankruptcy law" within the meaning of section 541(c)(1) and "applicable law" within the meaning of section 363(l). *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 2246, 119 L. Ed. 2d 519 (1992) (ERISA constitutes "applicable nonbankruptcy law"). Moreover, it is obvious that section 2 of the Rates Act, by limiting the right of carriers to collect undercharge claims to 0% to 20% of the original claim, "effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property."

C.

Finally, we determine whether section 2 of the Rates Act is "conditioned on the insolvency or financial condition of the debtor." If so, section 363(l) of the Bankruptcy Code will prohibit its application to bankrupt carriers and Transcon will prevail on its undercharge claim. If not, section 2 will apply to Transcon and will shield Sterling from liability for the claim.

As stated earlier, sections 2(a)(2), (3), (4), and 2(e) of the Rates Act expressly apply only to a carrier that "is no longer transporting property" or is transporting property "for the purpose of avoiding the application of this subsection." 49 U.S.C. § 10701(f)(1)(A) (Rates Act § 2(a)); Rates Act § 2(e)(1) (same). For purposes of this analysis we assume, without deciding, that section 2(a)(9) is also subject to this same condition. Transcon argues that by conditioning the forfeiture or modification of property on the status of no longer transporting property, the Rates Act effectively conditions such forfeiture or modification on the "financial condition" of the debtor.

In support of this assertion, Transcon has presented the declaration of Mr. Chelliah, an accountant who states that "when used to describe a motor carrier of property, the words 'no longer transporting property' refer to and describe the financial condition of the motor carrier." Mr. Chelliah further states that such a carrier would be required, under generally accepted accounting principles, to report its nonoperational status on its balance sheets. Presented along with Mr. Chelliah's declaration are certain accounting texts that emphasize the importance of operating income as an element of financial reporting and

as an indicator of the overall financial condition of an enterprise.

Sterling and amici argue, however, that the nonoperational condition of the debtor is not necessarily the same as the insolvency or financial condition of the debtor. They correctly observe that it is possible for a carrier to stop transporting freight and yet remain solvent. They also correctly point out that it is possible for a carrier to seek bankruptcy protection and still continue to transport property under a plan of reorganization. Indeed, a number of bankruptcy courts have found determinative that insolvency and nonoperational status are not concentric. *See, e.g., Grinnell,* 167 Bankr. at 493; *Allen v. ITM, Ltd.,* 167 Bankr. 63, 66 (M.D.N.C. 1994).

Sterling and amici also maintain that there is a valid reason to differentiate based on operational status other than simply to evade the antiforfeiture provisions of the Bankruptcy Code. A carrier that is actively engaged in the business of transporting property has a strong disincentive to file unreasonable undercharge claims: the need to maintain goodwill with its customers. On the other hand, a nonoperational carrier, regardless of its financial condition, has no disincentive to file such claims. This rationale has been relied on by several other courts in holding that conditioning the application of section 2 on the nonoperational status of a motor carrier of freight is not equivalent to conditioning it on their insolvency or financial condition. *See, e.g., Whittier,* 57 F.3d at 647; *Jones Truck Lines v. AFCO Steel,* 849 F. Supp. 1296, 1304-05 (E.D. Ark. 1994); *Polykote,* 170 Bankr. at 568.

Sterling and amici point to the example of A-Line, Ltd., a large motor carrier that divested its operations yet continued to procure a healthy stream of income by collecting on the numerous undercharge claims it possessed. Moreover, Gumport himself emphasized at oral argument that there are a substantial number of large nonoperating motor carriers that are not in bankruptcy.

Both in its briefs and at oral argument, Transcon has persuasively emphasized that a motor carrier's nonoperational status "relates to" and is "indicative of" its financial condition. A motor carrier's cessation of operations necessarily has an effect on its financial condition and would certainly be reflected on its financial statements. Thus, the financial condition of a motor carrier and its operational status are indeed related. However, because of the unusual characteristics of the motor freight industry, at least as it existed before the enactment of the Reform Act, section 2 is not *"conditioned on"* the insolvency or financial condition of the debtor. *Accord Whittier*, 57 F.3d at 647.

Transcon argues that creating a distinction between financial condition and operational condition will eviscerate the Bankruptcy Code's antiforfeiture provisions and compel courts to enforce default clauses in leases or contracts that are triggered by reference to a party's operational status. In effect, Transcon argues that our decision will make it possible for creditors to evade the Bankruptcy Code's antiforfeiture provisions by conditioning contractual defaults on operational criteria which are actually indicia of a debtor's insolvency or financial condition.

In *In re Tom Stimus Chrysler-Plymouth*, 134 Bankr. 676 (Bankr. M.D. Fla. 1991), the bankruptcy court held that a similar antiforfeiture provision, 11 U.S.C. § 365, invalidated a provision in a franchise agreement that purported to forfeit the debtor's franchise if the debtor ceased operating for more than 10 days. At least one bankruptcy court has refrained from holding that section 2 of the Rates Act is not conditioned on insolvency or financial condition for fear that it would create conflict with cases such as *Stimus Chrysler-Plymouth* and would preclude the future invalidation of similar default clauses. *See Jones Truck Lines v. IXL Mfg. Co. (In re Jones Truck Lines)*, 172 Bankr. 602, 613 (Bankr. W.D. Ark. 1994). Similarly, another bankruptcy court has shared Transcon's concern that "every creditor and governmental entity would seek to enforce *ipso facto* forfeitures against debtors in bankruptcy on the ground that they no longer have revenues and/or income and/or business operations." *Cooper v. E.I. Du Pont de Nemours & Co. (In re Bulldog Trucking)*, 173 Bankr. 517, 537 (W.D.N.C. 1994) (emphasis in original). We are not swayed by these concerns, however, because we do not hold that conditioning a default on a debtor's operational status is never prohibited by the Bankruptcy Code's antiforfeiture provisions.

The term "financial condition" represents a concept that is somewhat broader than operational status. In some cases, especially when a business has no potential source of significant revenues other than from its operations, a business's operational condition and financial condition might be considered one and the same. However, because of the unusual nature of the motor freight industry that existed before the enactment of the Reform

Act, a motor common carrier's solvency or financial condition was not necessarily dependent upon the continuation of operations. There are many former motor common carriers of freight, most notably A-Line, Ltd., that have remained solvent and financially healthy not by continuing their operations, but by turning to the lucrative business of suing their former customers.

Finally, in reaching the conclusion that section 2 is not conditioned on the insolvency or financial condition of the debtor, and therefore does not create a conflict with the Bankruptcy Code's antiforfeiture provisions, we are mindful of the fact that we must, whenever possible, attempt to reconcile potential conflicts in statutory provisions. We have repeated time and time again that "Congress must be presumed to have known of its former legislation . . . and to have passed . . . new laws in view of the provisions of the legislation already enacted." *Hellon & Assoc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) (internal quotations and citations omitted). Thus, our holding is fully consistent with our canons of statutory construction and most likely to effectuate congressional intent.

V

We conclude that section 2 of the Rates Act is not "conditioned on the insolvency or financial condition of the debtor," and that it therefore does not conflict with the antiforfeiture provisions of the Bankruptcy Code. We hold that section 2 applies to Transcon's undercharge claim against Sterling despite Transcon being in bankruptcy.

We express no opinion on the question of whether section 2(a)(9) applies only to carriers that are no longer transporting property. We also express no opinion on the effect of the Reform Act on undercharge claims that have arisen after the date of its enactment.

AFFIRMED.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING

APPENDIX B

In re: TRANSCON LINES, Debtor

LEONARD L. GUMPORT, Trustee of
the Bankruptcy Estate of Transcon Lines,
Plaintiff-Appellant,

v.

STERLING PRESS,
Defendant-Appellee.

No. 94-55425
D.C. No. CV-94-01248-IH
United States Court of Appeals
Ninth Circuit
Filed September 14, 1995

Appeal from the United States District Court for the Central District of California Irving Hill, District Judge, Presiding
Argued and Submitted October 6, 1994 –
Pasadena, California
Filed July 10, 1995

Before: J. Clifford Wallace, Chief Judge, Stephen Reinhardt and Melvin Brunetti, Circuit Judges. Opinion by Chief Judge Wallace.

ORDER

The opinion in this case, filed July 10, 1995, is amended as follows:

At slip op. 8097, second full paragraph, line 8, delete "unique" and substitute "unusual";

At slip op. 8099, lines 4-5 delete "As Transcon itself asserted at oral argument," and capitalize "t" in the following word "there."

With the above amendments, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

TRANSCRIPT OF ORAL DECISION OF DISTRICT COURT ON MARCH 22, 1994

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

IN RE: TRANSCON LINES, DEBTOR.	NO. CV 94-1248-IH
LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES, PLAINTIFF, VS. STERLING PRESS, DEFENDANT.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, MARCH 22, 1994

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LOS ANGELES, CALIFORNIA; TUESDAY, MARCH 22, 1994; 9:45 A.M.

-()-

THE COURT: GOOD MORNING, COUNSEL.

ALL RIGHT, MR. CLERK. IF YOU WILL CALL THE MATTER, PLEASE. GO AHEAD.

THE CLERK: CV 94-1248-IH, IN RE TRANSCON LINES, DEBTOR. LEONARD L. GUMPORT, TRUSTEE VERSUS STERLING PRESS.

COUNSEL, WOULD YOU ANNOUNCE YOUR APPEARANCES, PLEASE.

MR. GUMPORT: GOOD MORNING, YOUR HONOR.

LEONARD GUMPORT, CHAPTER 7 TRUSTEE OF TRANSCON LINES AND A MEMBER OF THE BAR OF THIS COURT.

THE COURT: YES. WILL YOU BE HANDLING THE MATTER TODAY?

MR. GUMPORT: YES, YOUR HONOR.

THE COURT: AND YOU HAVE WITH YOU AT COUNSEL TABLE?

MR. STEINFELD: MR. JOSEPH L. STEINFELD, JR. OF SIMS, WALKER & STEINFELD, MR. ROBERT WALKER, MR. STEINFELD'S PARTNER, AND MR. GREGORY ABRAMS OF A.S.K. FINANCIAL. THEY ARE PROFESSIONALS EMPLOYED BY THE TRANSCON LINES ESTATE.

THE COURT: ALL RIGHT. THE LAST GENTLEMAN WAS NAMED ABRAMS; IS THAT RIGHT?

MR. ABRAMS: YES, SIR.

THE COURT: ALL RIGHT. THANK YOU.

NOW, FOR DEFENDANT,

MR. DICKERSON: GOOD MORNING, YOUR HONOR.

MARK DICKERSON ON BEHALF OF THE DEFENDANT, STERLING PRESS.

WITH ME AT COUNSEL TABLE ARE MS. BETH COOK OF THE UNITED STATES DEPARTMENT OF JUSTICE; MR. HENRY RUSH, THE ACTING GENERAL COUNSEL OF THE INTERSTATE COMMERCE COMMISSION; MR. DANIEL SWEENEY OF MCCARTHY, SWEENEY & HARKAWAY.

THE COURT: WHICH IS MR. RUSH?

MR. RUSH: YES, SIR.

THE COURT: THANK YOU.

AND MR. SWEENEY IS NEXT TO HIM. GO AHEAD. WHO IS HE?

MR. DICKERSON: MR. SWEENEY IS REPRESENTING THE NATIONAL – THE SMALL CLAIMS –

MR. SWEENEY: THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE.

THE COURT: YES. THANK YOU, MR. SWEENEY.

NOW, YOU ARE GOING TO SPEAK FOR DEFENDANT TODAY; RIGHT?

MR. DICKERSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND FOR THE COMMISSION, THE ONLY AMICUS TO WHOM THE COURT MADE A PROMISE OF BEING HEARD ORALLY, WHO IS SPEAKING?

MS. COOK: YOUR HONOR, I'M GOING TO SPEAK. BETH COOK OF THE DEPARTMENT OF JUSTICE.

THE COURT: VERY WELL, MS. COOK.

NOW, THERE ARE OTHER COUNSEL PRESENT, I AM SURE, AND IF THEY ARE, LET THEM ANNOUNCE THEIR PRESENCE.

MS. REYNOLDS: GOOD MORNING, YOUR HONOR.

MARY KAY REYNOLDS REPRESENTING TRANSPORTATION CLAIMS AND PREVENTION COUNCIL.

THE COURT: OKAY, MS. REYNOLDS.

MR. BUTLER: GOOD MORNING, YOUR HONOR.

JOSEPH BUTLER FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE.

THE COURT: YES, MR. BUTLER.

MR. KAPLAN: GOOD MORNING, YOUR HONOR.

ELLIOT KAPLAN FOR CHRYSLER CORPORATION.

THE COURT: ONE SECOND. LET'S SEE IF THE CLERK HAS GOTTEN YOU ON THIS LONG LIST YET.

THE CLERK: I DO NOT.

THE COURT: SO TELL ME AGAIN, MR. KAPLAN, YOU REPRESENT WHOM?

MR. KAPLAN: CHRYSLER CORPORATION.

THE COURT: ALL RIGHT. IT HAS NOT FILED ANY PAPERS, AS I RECALL.

MR. KAPLAN: NO, SIR, IT HAS NOT.

THE COURT: OKAY. THANK YOU.

ALL RIGHT. THE COURT HAS BEFORE IT TODAY MUTUAL SUMMARY JUDGMENT MOTIONS. WE ARE DEALING WITH A CASE THAT HAS INTERESTING ANTECEDENTS AND ORIGINS, AND A BRIEF DESCRIPTION OF THOSE ANTECEDENTS AND ORIGINS IS IN ORDER.

OUR CASE COMMENCES SOME YEARS AGO WITH THE BANKRUPTCY OF TRANSCON, A MAJOR NATIONAL TRUCKING COMPANY, WHICH WAS ALSO AN I.C.C. REGULATED CARRIER.

THE TRANSCON BANKRUPTCY WAS IN THIS DISTRICT. THE PLAINTIFF HERE, MR. GUMPORT, IS TRANSCON'S TRUSTEE IN BANKRUPTCY.

IT'S THE TRUSTEE'S JOB TO MARSHAL, AND REALIZE UPON, ASSETS OF THE BANKRUPT'S ESTATE. I CONTINUE TO USE THE WORD "BANKRUPT," WHICH I GATHER IS AN OLD FASHIONED

WORD AND I SUPPOSE I SHOULD NOT USE IT ANYMORE. THE PRESENT TERMINOLOGY IS "DEBTOR." SO WE WILL REFER TO TRANSCON AS THE DEBTOR FROM NOW ON.

BY FAR THE MOST POTENTIALLY SIGNIFICANT ASSET IN THE ESTATE OF TRANSCON IS TRANSCON'S CLAIM AGAINST THE THOUSANDS OF SHIPPERS WHO EMPLOYED TRANSCON THROUGHOUT THE YEARS PAST TO SHIP THEIR FREIGHT. THAT CLAIM IS THAT TRANSCON CHARGED ITS CUSTOMERS LESS AND COLLECTED LESS FROM THEM THAN THE I.C.C. FILED RATE. THE CLAIM PROCEEDS ON THE PREMISE THAT THERE IS AN OBLIGATION FOR A SHIPPER TO PAY THE FILED RATE, AND THEREFORE, SOME ADDITIONAL CHARGES MUST NOW BE PAID FOR THAT PAST CARRIAGE.

IN THE BEGINNING, WHEN THESE CLAIMS WERE FIRST ASSERTED BY MR. GUMPORT, THIS BANKRUPTCY TRUSTEE AND BY OTHER BANKRUPTCY TRUSTEES FOR OTHER I.C.C. CARRIERS IN BANKRUPTCY, THERE WAS VIGOROUS LITIGATION IN EACH OF THOSE BANKRUPTCIES WHICH INVOLVED THE TRUSTEE ON THE ONE HAND AND THE SHIPPERS ADJOINED AS DEFENDANTS. AND ALSO INVOLVED I.C.C. ALL ON THE OTHER HAND.

IT DOESN'T PAY FOR THE COURT TO GO INTO THE DETAILS OF THAT LITIGATION TODAY. HOWEVER, THE TRUSTEE'S RIGHT, AT LEAST TO A LIMITED EXTENT TO OBTAIN ADDITIONAL MONEY FROM SHIPPERS WHO PAID A RATE WHICH WAS LESS AND DISCOUNTED FROM THE FILED RATE WAS

VINDICATED. IT WAS VINDICATED IN THE FINAL ANALYSIS BY A DECISION OF THE SUPREME COURT.

THE TRUSTEE OF TRANSCON, MR. GUMPORT, FILED A GROUP OF ACTIONS TO RECOVER THOSE UNDERCHARGES, NAMING THOUSANDS OF DEFENDANTS.

JUDGE NAUGLE, THE BANKRUPTCY JUDGE IN THIS DISTRICT, HAS BEEN ASSIGNED THESE ACTIONS, WHICH ARE ALL ADVERSARY PROCEEDINGS.

MR. GUMPORT FILED IN JUDGE NAUGLE'S COURT ONLY A FEW COMPLAINTS, AS I UNDERSTAND IT. EACH COMPLAINT, HOWEVER, NAMING HUNDREDS, IF NOT THOUSANDS OF DEFENDANTS.

WHEN A COMPLAINT WAS SERVED ON AN INDIVIDUAL DEFENDANT, JUDGE NAUGLE ORDERED THAT THAT PROCEEDING; NAMELY, TRUSTEE VERSUS THAT PARTICULAR DEFENDANT, A FORMER SHIPPER, WAS TO BE BROKEN OUT AS A SEPARATE ADVERSARY PROCEEDING AND GIVEN A SEPARATE ADVERSARY CASE NUMBER. AND AS I UNDERSTAND IT, HE REQUIRED THE FILING OF A SEPARATE COMPLAINT JUST AGAINST THAT DEFENDANT BY THE TRUSTEE AND THE SERVED DEFENDANT, OF COURSE, WAS REQUIRED TO FILE HIS OR HER OR ITS SEPARATE ANSWER.

NOW, THAT'S WHAT WE HAVE HERE TODAY IN THIS COURT. WE HAVE ONE OF THOSE BREAKOUT PROCEEDINGS.

AFTER THE SERVICE OF ONE OF THOSE BIG MULTI-DEFENDANT COMPLAINTS ON OUR DEFENDANT STERLING PRESS AND THE BREAKOUT OF THAT CASE INTO A SEPARATE CASE IN THE BANKRUPTCY COURT, AS I HAVE DESCRIBED, THAT SEPARATE CASE IN THE BANKRUPTCY COURT WAS GIVEN THE NUMBER SB 93-2917-DN. AND WHEN THAT ALL HAPPENED, THE PARTIES CAME TO THIS COURT WITH A REQUEST AND A PROPOSAL THAT I WITHDRAW THE REFERENCE, THAT'S A TECHNICAL TERM, INVOLVING THE RELATIONSHIP OF THE DISTRICT COURT AND THE BANKRUPTCY COURT.

THEY ASKED ME TO WITHDRAW THE REFERENCE ONLY PRO TANTO, MEANING WITHDRAW IT ONLY FOR THIS ONE ADVERSARY CASE, *GUMPORT* VERSUS *STERLING PRESS*. AND HAVING ASCERTAINED THAT JUDGE NAUGLE WOULD HAVE NO OBJECTION TO THAT BEING DONE AND AFTER LOOKING AT IT AND DETERMINING THAT IT WAS IN EVERYONE'S INTEREST TO DO IT THAT WAY, FOR REASONS I WILL COME TO IN A MOMENT, THIS COURT ON FEBRUARY 25 OF THIS YEAR DID WITHDRAW THE REFERENCE. AND THUS, THE ENTIRE LIMITED SINGLE ADVERSARY PROCEEDING OF *GUMPORT* VERSUS *STERLING PRESS* IS IN THIS COURT FOR ALL PURPOSES. AND WE HAVE GIVEN THAT CASE A NEW DISTRICT COURT NUMBER, 94-1248-IH, WHICH THE CLERK CALLED THIS MORNING.

THE FACTORS THAT MOTIVATED ME TO WITHDRAW THE REFERENCE ARE WORTH PUTTING ON THE RECORD.

AFTER THE DECISION OF THE SUPREME COURT AFFIRMING AND REMANDING PRIOR ADJUDICATIONS AND THE FOLLOW-UP DECISION IN THE NINTH CIRCUIT, ALL OF WHICH CLEARLY ESTABLISHED THE TRUSTEE'S RIGHT TO RECOVER CERTAIN FUNDS, CERTAIN UNDERCHARGES FROM SHIPPERS OF THIS TYPE, CONGRESS, AS YOU ALL KNOW, PASSED A STATUTE KNOWN AS THE NEGOTIATED RATES ACT OF 1993, WHICH WE HAVE REFERRED TO AND WILL CONTINUE TO AS THE N.R.A.

THE N.R.A. PART OF TITLE 49 OF THE UNITED STATES CODE AND IS WRITTEN AS BEING AMENDATORY OF CERTAIN EXISTING SECTIONS OF TITLE 49. THE N.R.A. HAS PUBLIC LAW NUMBER 103-180, DECEMBER 3, 1993.

THE N.R.A., ACCORDING TO THE DEFENDANT STERLING PRESS, AND ACCORDING TO COUNSEL FOR THOUSANDS OR PERHAPS HUNDREDS OF THOUSANDS OF OTHER SIMILARLY-SITUATED SHIPPERS, HAS A VERY GREAT EFFECT ON THE EXISTING PROCEEDINGS AND PROCEEDINGS LIKE IT IN BANKRUPTCY COURTS ALL AROUND THE COUNTRY, PROCEEDINGS AGAINST THE SHIPPERS. STERLING PRESS ARGUES THAT WITHIN THE LIMITED FRAMEWORK OF OUR CASE, IT HAS THAT SAME DRASTIC EFFECT.

THE DEFENDANT STERLING HAS FILED AN ANSWER IN OUR CASE WHICH ASSERTS AN AFFIRMATIVE DEFENSE BASED ON N.R.A. THE AFFIRMATIVE DEFENSE CLAIMS AND ALLEGES THAT

STERLING QUALIFIES AS A SMALL BUSINESS CONCERN UNDER N.R.A. AND THAT CERTAIN PROVISIONS OF N.R.A. ALLOW SMALL BUSINESS CONCERNS, INCLUDING STERLING, TO ESCAPE TOTALLY ANY LIABILITY IN THIS CASE FOR THIS TYPE OF UNDERCOLLECTION OF FILED RATES. OF COURSE, THERE IS SUCH AN ESCAPE PROVISION IN N.R.A. AND IT IS MADE AVAILABLE TO SMALL BUSINESS CONCERNS USING A DEFINITION OF THAT TERM FROM ANOTHER FEDERAL STATUTE, THE SMALL BUSINESS ACT FOUND AT 15 U.S.C. SECTION 631, AND FOLLOWING.

WHILE THE TRUSTEE, MR. GUMPORT, RECOGNIZES THAT THE STATUTE PURPORTS TO GIVE SUCH A TOTAL DEFENSE TO STERLING PRESS AND SIMILAR CONCERNS, AND THE TRUSTEE DOES NOT CLAIM THAT STERLING FAILS TO MEET THE DEFINITION OF A SMALL BUSINESS UNDER THE STATUTE. HE ADMITS THAT.

THE TRUSTEE GOES ON TO ARGUE THAT N.R.A. CANNOT AND SHOULD NOT BE CONSTRUED TO IN ANY WAY ADVERSELY AFFECT OR LIMIT HIS RIGHTS AS PLAINTIFF IN THE EXISTING LITIGATION HE HAS FILED AGAINST STERLING OR AGAINST ANY OTHER DEFENDANT THAT HE HAS NAMED IN THOSE ADVERSARY PROCEEDINGS.

THE TRUSTEE PHRASES HIS CLAIM AS ONE WHICH ARGUES THAT THE NEW STATUTE IS UNENFORCEABLE AS APPLIED TO THE TRUSTEE'S EXISTING LITIGATION AND TO HIS CLAIM AGAINST STERLING. WHAT THE TRUSTEE IS REALLY ARGUING

IS THAT THE NEW STATUTE MUST AND SHOULD BE CONSTRUED IN A WAY THAT WILL NOT TOUCH, WILL NOT AFFECT THOSE CLAIMS.

GOING BACK AGAIN TO THE HISTORY OF THIS CASE, I THINK I SHOULD HAVE SAID, AND I WILL NOW, THAT THE PARTIES JOINTLY ASKED ME TO WITHDRAW THE REFERENCE. BOTH PLAINTIFF AND DEFENDANT DID. AND THEY WERE JOINED IN THAT REQUEST BY THE I.C.C. AND BY COUNSEL FOR A NUMBER OF OTHER INTERESTED GROUPS AROUND THE COUNTRY.

A DIFFERENT PIECE OF LITIGATION THAT WAS THEN PENDING IN MY COURT HAD NAMED I.C.C. AS A DEFENDANT. THAT CASE WAS *GUMPORT* VERSUS *I.C.C.*, 93-7719.

MANY OF THE INTERESTED GROUPS HAD COME INTO THAT CASE AS AMICI. THAT LITIGATION, LIKE THIS ONE, INVOLVED THE SCOPE AND EFFECT OF N.R.A. THUS, I.C.C. AND THE AMICI HAD A MAJOR INTEREST IN ANY LITIGATION INVOLVING THE CONSTRUCTION OF N.R.A., AND ALL OF THOSE PEOPLE, I.C.C. AND THE AMICI, ALL OF THEM, WANTED THE REFERENCE WITHDRAWN AND ASKED THAT IT BE WITHDRAWN.

THE BASIC REASON ENUNCIATED FOR THE PARTIES FOR WITHDRAWING THE REFERENCE WAS SO THAT THIS COURT, A DISTRICT COURT, COULD QUICKLY ADJUDICATE THE DISPUTE BETWEEN THE PARTIES CONCERNING THE SCOPE AND EFFECT OF N.R.A.

THE PARTIES AGREED THAT IF THE COURT WAS WILLING TO WITHDRAW THE REFERENCE, MUTUAL SUMMARY JUDGMENT MOTIONS WOULD IMMEDIATELY BE FILED ON STIPULATED FACTS AND A HEARING COULD PROMPTLY BE HELD. WE SET TODAY AS THE HEARING DATE WHEN THE COURT AGREED TO WITHDRAW THE REFERENCE, SO THIS PROCEEDING IS PURSUANT TO THE JOINT REQUEST AND DESIRES THAT I HAVE JUST DESCRIBED.

INCIDENTALLY, ALL PARTIES AND ALL OF THE AMICI ASSURED ME THAT THE MUTUAL SUMMARY JUDGMENT MOTIONS WE ARE HEARING WOULD INVOLVE NO QUESTION OR ISSUE OF CONSTITUTIONAL LAW AND NO SUCH ISSUE HAS BEEN PRESENTED BY THE PAPERS OF ANY OF THEM.

BY AGREEMENT OF THE PARTIES TO THIS CASE, AND BY ORDER OF THE COURT, ALL THE BRIEFS FILED CONCERNING THE SCOPE AND EFFECT OF N.R.A. IN THAT PRIOR CASE, *GUMPORT* VERSUS *I.C.C.*, HAVE BEEN TRANSFERRED OVER AND MADE APPLICABLE TO THIS CASE. AND EVERYONE AGREED THAT THE MATTER WAS FULLY BRIEFED SO THAT NO NEW OR ADDITIONAL BRIEFS WOULD BE FORTHCOMING OR ALLOWED, EXCEPT FOR A BRIEF ON THE MERITS FILED BY MR. DICKERSON, COUNSEL FOR ONE OF THE AMICI, WHO HAD NOT BRIEFED THE MERITS UP TO THAT TIME.

THE COURT WAS AGREEABLE TO A NEW BRIEF ON THE MERITS FROM MR. DICKERSON. IT HAS COME IN.

MR. GUMPORT HAS FILED A REPLY TO IT, AND MR. DICKERSON HAS TRIED TO FILE A SUR-REPLY, FILED UNDER DATE OF MARCH 18, WHICH WAS NOT AUTHORIZED AND IT'S STRICKEN.

ALL RIGHT. LET'S GET BACK TO WHAT WE'RE DOING TODAY.

THE STIPULATED FACTS UPON WHICH TODAY'S PROCEEDING IS BASED IS ENTITLED: STIPULATION OF UNCONTESTED FACTS, FILED MARCH 4, 1994, AND SIGNED ONLY BY COUNSEL FOR PLAINTIFF AND DEFENDANT.

AS I UNDERSTAND IT, HOWEVER, THE I.C.C. DOES NOT QUARREL IN ANY WAY WITH THIS STIPULATION, DOESN'T CONTEST THAT THE FACTS STIPULATED TO ARE FACTS, AND DOESN'T SEEK THE ADDITION OF ANY ADDITIONAL FACTS. AM I RIGHT?

MS. COOK: THAT'S CORRECT, YOUR HONOR.

THE COURT: NOW TO THE JUDGMENT MOTIONS. DEFENDANT'S SUMMARY JUDGMENT MOTION SEEKS TOTAL JUDGMENT IN ITS FAVOR IN THE CASE; NAMELY, A JUDGMENT BY THE COURT THAT PLAINTIFF MAY TAKE NOTHING BY ITS ACTION. THE ACTION WOULD BE PURSUANT TO THAT JUDGMENT DISMISSED WITH PREJUDICE.

PLAINTIFF REQUESTED SUMMARY JUDGEMENT IS OF A MORE LIMITED SCOPE. IT IS ONLY A MOTION FOR A PARTIAL SUMMARY JUDGMENT. PLAINTIFF'S REQUESTED JUDGMENT SEEKS A DISMISSAL OF STERLING'S AFFIRMATIVE DEFENSES BASED ON THE

N.R.A., AND RECOGNIZING THAT A TOTAL JUDGMENT IS NOT REQUESTED BY THE TRUSTEE, THE TRUSTEE ASKS ME ALSO IF HIS MOTION IS GRANTED TO CERTIFY THE CASE FOR INTERIM APPEAL, SINCE, OF COURSE, THERE WOULD NOT BE AS YET A FINAL JUDGMENT IN THE CASE. THOSE ARE THE JUDGMENTS. EXCUSE ME. THOSE ARE THE MOTIONS.

NOW, ORDINARILY IN SUMMARY JUDGMENT PROCEEDINGS, WHETHER UNILATERAL OR BILATERAL, I FOLLOW THE PRACTICE OF LISTING ALL THE EVIDENCE THAT IS BEFORE ME TO MAKE SURE I HAVE SEEN IT ALL.

HERE THE PARTIES AGREE THAT THERE IS NO BONA FIDE DISPUTE OF MATERIAL FACTS, SO IT IS IN MY VIEW UNNECESSARY TO LIST ANY EVIDENCE. THE ONLY EVIDENCE IS THAT WHICH IS CONTAINED IN THE STIPULATION OF FACTS.

WOULD COUNSEL AGREE WITH THAT?

MR. GUMPORT: YOUR HONOR, I WOULD NOT AGREE WITH THAT. THERE IS OTHER –

THE COURT: WHAT OTHER EVIDENCE IS THERE?

LET'S LEAVE ASIDE LEGISLATIVE HISTORY MATERIALS. I HAVE HAD STACKS OF THOSE, MAYBE SIX FEET TALL, BUT I PUT THAT IN A SEPARATE CATEGORY.

MR. GUMPORT: ALL RIGHT. WELL, THAT'S A VERY IMPORTANT SEPARATE CATEGORY BECAUSE,

OF COURSE, WE HAVE A DECLARATION FROM MR. STEINFELD RELATING TO THAT.

YOUR HONOR, ANOTHER ITEM WOULD BE – TWO ITEMS THAT I HAD IDENTIFIED ARE THAT THERE IS A DECLARATION FROM MR. CHELLIAH, A CERTIFIED PUBLIC ACCOUNTANT, ADDRESSING THE ISSUE AS TO WHETHER OR NOT A COMPANY'S BEING DEFUNCT RELATES TO ITS FINANCIAL CONDITION, AND THAT HAS NOT BEEN OBJECTED TO BY ANYBODY.

THE COURT: I SAW IT. I DID NOT SEE ANY OBJECTION. I DID NOT QUITE UNDERSTAND HOW IT FITTED IN WITH THE STIPULATION OF FACTS. WHAT'S THE SECOND ITEM?

MR. GUMPORT: YOUR HONOR, A SECOND ITEM RELATES TO THE REPLY BRIEF THAT WAS FILED BY MR. DICKERSON, THE TIMELY BRIEF THAT HE SUBMITTED ON FEBRUARY 25, 1994. THAT'S A DECLARATION FROM MYSELF RELATING TO WHETHER OR NOT THE BANKRUPTCY COURT HAS ISSUED CERTAIN ORDERS AUTHORIZING THE USAGE OF TRANSCON'S FREIGHT UNDERCHARGE CLAIMS, AND THAT EVIDENCE HAS NOT BEEN OBJECTED TO.

THE COURT: I DO NOT REGARD THAT AS IN DISPUTE EITHER. LET'S SEE WHAT THE OTHER SIDE HAS TO SAY ABOUT THAT. FIRST DEFENDANT.

DO YOU, I GUESS, INTEND TO HAVE CHELLIAH'S DECLARATION CALLED EVIDENCE FOR WHATEVER WEIGHT THAT THE COURT WOULD GIVE IT.

MR. DICKERSON: FOR WHATEVER WEIGHT THAT WOULD BE GIVEN, I HAVE NO OBJECTION TO IT BECAUSE I CONSIDER IT TO BE RATHER IRRELEVANT.

THE COURT: VERY WELL. AND THE DECLARATION ACCOMPANYING MR. GUMPORT'S REPLY?

MR. DICKERSON: ABSOLUTELY NOT, YOUR HONOR. YOU COULD EASILY TAKE JUDICIAL NOTICE OF IT, SO IT WOULD SERVE NO PURPOSE.

THE COURT: ALL RIGHT. DO YOU WANT TO BE HEARD FOR THE I.C.C. ON THOSE TWO MATTERS? YOU'RE NOT A PARTY, BUT . . .

MS. COOK: I WOULD AGREE WITH WHAT MR. DICKERSON SAID.

THE COURT: VERY WELL. OKAY. I WILL THEN CONSIDER THOSE TWO ITEMS AS EVIDENCE, AND WE'LL GO ON FROM THERE.

IN ADDITION TO THE STIPULATION OF FACTS, AS I JUST TOLD MR. GUMPORT, THERE IS THIS VAST AMOUNT OF LEGISLATIVE HISTORY MATERIAL AND I'M NOT GOING TO TAKE TIME TO LIST IT.

NEITHER PARTY HAS OBJECTED TO ANY OF THOSE LEGISLATIVE HISTORY MATERIALS FURNISHED BY THE OTHER OR BY THE AMICUS, SO WE'LL GO ON.

NOW, TO SUPPORT HIS CONTENTION THAT THE NEW STATUTE MUST BE CONSTRUED AS HAVING NO ADVERSE EFFECT ON HIS REMEDIES AGAINST DEFENDANT STERLING AS THEY EXISTED BEFORE

THE N.R.A. WAS PASSED, THE TRUSTEE ADVANCES ONE MAJOR PROPOSITION, AND HERE WE COME TO THE CENTRAL ISSUE OR ISSUES IN THE CASE.

THE TRUSTEE'S MAJOR LINE OF ARGUMENT IS THIS:

FIRST, THE TRUSTEE DELINEATES CERTAIN PROVISIONS OF TITLE 11 OF THE UNITED STATES CODE, THE BANKRUPTCY CODE, AS ANTIFORFEITURE PROVISIONS. HE DESIGNATES TWO OF THEM: 11 U.S.C. SECTION 541(C)(1)(B). THE OTHER SECTION DESIGNATED IS 363(L).

541(C)(1)(B) IN RELEVANT PART PROVIDES AS FOLLOWS:

"AN INTEREST OF THE DEBTOR IN PROPERTY BECOMES PROPERTY OF THE ESTATE . . . "

I'VE LEFT OUT CERTAIN LANGUAGE, BUT I AM JUST STATING THE RELEVANT LANGUAGE. I'LL START AGAIN.

"AN INTEREST OF THE DEBTOR IN PROPERTY BECOMES PROPERTY OF THE ESTATE, NOTWITHSTANDING ANY PROVISION IN AN AGREEMENT, TRANSFER INSTRUMENT, OR APPLICABLE NONBANKRUPTCY LAW . . . "

" . . . THAT IS CONDITIONED UPON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR . . . AND THAT EFFECTS OR GIVES AN OPTION TO EFFECT A FORFEITURE, MODIFICATION, OR TERMINATION OF THE DEBTOR'S INTEREST IN PROPERTY."

SECTION 363(L), THE OTHER ONE DESIGNATED BY THE TRUSTEE IN SUBSTANCE SAYS, AND I'M WON'T QUOTE IT, THAT A BANKRUPTCY TRUSTEE MAY USE OR SELL PROPERTY OF THE ESTATE, NOTWITHSTANDING THE PROVISIONS OF ANY LAW THAT IS CONDITIONED ON THE FINANCIAL CONDITION OF THE DEBTOR AND EFFECTS A FORFEITURE OR A MODIFICATION OF THE VALUE OF THE ASSET.

THE TRUSTEE GOES ON TO SAY THAT EVEN THOUGH N.R.A. ON ITS FACE PURPORTS TO GIVE BENEFITS AND BENEFICIAL REMEDIES TO SHIPPER DEFENDANTS THAT THE TRUSTEE HAS SUED IN THE ADVERSARY PROCEEDINGS, N.R.A. SHOULD NOT AND MUST NOT BE CONSTRUED AS APPLICABLE TO THOSE PROCEEDINGS OR AS GIVING ANY BENEFITS TO THOSE FORMER SHIPPERS NAMED AS A DEFENDANT BECAUSE N.R.A. IS A STATUTE IN WHICH THE BENEFITS AND REMEDIES ARE, QUOTE: "CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR . . . " CLOSE QUOTE.

GOING ON, THE TRUSTEE ESSENTIALLY ARGUES THIS WAY:

THESE RIGHTS TO RECOVER UNDERCHARGES ARE ASSETS OF THE ESTATE, PROPERTY OF THE ESTATE AND THEY WERE PROPERTY OF THE ESTATE WHEN I FILED THESE CASES IN JUDGE NAUGLE'S COURT BEFORE N.R.A. WAS PASSED.

LOOKING AT N.R.A., HE SAYS THAT UNDER 541(C)(1)(B), A STATUTE, ANY STATUTE CANNOT AFFECT THE PROPERTY RIGHTS OF THE ESTATE,

QUOTE: "CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR." CLOSE QUOTE.

SO THE TRUSTEE RECOGNIZES THAT THE BENEFITS OF N.R.A. IN HAC VERBA ARE NOT CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR. HE MUST RECOGNIZE THAT BECAUSE IN SECTION 2(A), N.R.A. MAKES ITS REMEDIES AVAILABLE TO SHIPPERS WHO DEALT WITH CARRIERS WHO HAVE STOPPED OR CEASED TO CARRIAGE OF GOODS IN INTERSTATE COMMERCE.

IN SECTION 2(A) OF N.R.A., THE RIGHTS THAT ARE GIVEN TO SHIPPERS TO DEFEND AGAINST CASES OF THE TYPE MR. GUMPORT HAS BROUGHT GIVE THEM THE RIGHT TO DEFEND AND TO ELECT VARIOUS REMEDIES PROVIDED BY N.R.A. IS LIMITED TO SITUATIONS IN WHICH THE CARRIER, AND I QUOTE FROM N.R.A.: "IS NO LONGER TRANSPORTING PROPERTY . . . " CLOSE QUOTE.

THE TRUSTEE SAYS THOSE WORDS ARE MATERIALLY A EUPHEMISM AND THAT I MUST READ THOSE WORDS AS MEANING BANKRUPT CARRIERS. HE POINTS TO PROVISIONS IN THE LEGISLATIVE HISTORY WHICH HE SAYS SUPPORT THAT CLAIM.

NOW, I SAID EARLIER THAT THE PLAINTIFF RELIES ON BOTH SECTIONS 541(C)(1)(B) AND 363(L) OF THE BANKRUPTCY CODE. I'M GOING TO SPEND THE REST OF MY ANALYSIS MENTIONING AND DEALING EXCLUSIVELY WITH 541(C)(1)(B) AND THIS IS WHY:

541(C)(1)(B) IS BROADER THAN AND MORE PROTECTIVE OF THE TRUSTEE THAN 363(L). IF THE TRUSTEE'S THEORY OF THE LAW IS REJECTED AS TO 541(C)(1)(B), PERFORCE, IT MUST ALSO BE REJECTED AS TO 363(L). THE REJECTION WOULD BE A FORTIORI.

THOSE TWO STATUTES, 541(C)(1)(B) AND 363(L), ARE SO DRAWN THAT ONE CANNOT SEPARATE INTO DIFFERENT ELEMENTS 363(L) FROM 541. AND IF THE BROADER ONE, 541, DOESN'T AVAIL THE TRUSTEE, THEN THE NARROWER ONE WILL NOT EITHER.

BOTH OF THEM, BOTH OF THOSE SECTIONS OF THE BANKRUPTCY CODE WERE ENACTED IN 1978, AND THE LEGISLATIVE HISTORY OF THE BILL FROM WHICH THEY WERE ENACTED AT THAT TIME CLEARLY AND UNEQUIVOCALLY STATES THAT 363(L) IS NARROWER THAN 541(C)(1)(B) WE'RE ADVANCING NOW TO A DISCUSSION OF THE MERITS OF THE CASE AND THE DIRECTION OF THE INTENDED DECISION.

THE TRUSTEE'S BASIC ARGUMENT IS THAT N.R.A. IS A STATUTE WITHIN THE DESCRIPTION OF THE ANTIFORFEITURE LAW 541(C)(1)(B). HE SAYS THE ANTIFORFEITURE LAW HAS NOT BEEN SPECIFICALLY AMENDED AND HE SAYS THE ANTIFORFEITURE LAW PROHIBITS ANY STATUTE LIKE N.R.A. FROM DEFEATING OR LIMITING THE TRUSTEE'S REMEDIES WITH RESPECT TO THE SALE OR OTHER REALIZATION OF ESTATE ASSETS.

TO TRY TO PROVE THAT PREMISE, HE ARGUES THAT N.R.A. MEETS EVERY REQUIREMENT OF A FORFEITURE STATUTE AS DEFINED IN 541(C)(1)(B). THE KEYSTONE ARGUMENT IS THAT N.R.A. IS A STATUTE IN WHICH THE BENEFITS AND REMEDIES OF IT, INCLUDING THE RELIEF WHICH IT GIVES TO DEFENDANTS LIKE STERLING PRESS AND OTHERS SIMILARLY SITUATED, IS RELIEF, QUOTE: "CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR." CLOSE QUOTE.

DEFENDANT TAKES STRONG ISSUE WITH THAT CLAIM AND POINTS OUT THAT THE STATUTE GRANTS ITS BENEFITS TO CUSTOMERS OR SHIPPERS OF CARRIERS WHO HAVE CEASED THE BUSINESS OF CARRYING PROPERTY AND DOESN'T HAVE A WORD IN IT ABOUT THE FINANCIAL CONDITION OF SUCH CARRIER.

IN MY TENTATIVE VIEW, COUNSEL, DEFENDANT IS CORRECT. N.R.A. CANNOT BE REASONABLY CONSTRUED OR INTERPRETED AS A STATUTE IN WHICH THE BENEFITS AND REMEDIES ARE, QUOTE: "CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION OF THE DEBTOR." CLOSE QUOTE.

TO READ IT THAT WAY WOULD DO VIOLENCE TO THE CLEAR LANGUAGE OF THE STATUTE WHICH CONTAINS NO SUCH CONDITION OR LIMITATION.

THE TRUSTEE SAYS THAT BECAUSE EVERYBODY ADVOCATING PASSAGE OF N.R.A. BEFORE IT BECAME LAW KNEW WHAT ITS MAIN OBJECTIVE

WAS AND SHARED THE SAME OBJECTIVE, WHICH WAS TO CONTROL AND LIMIT THE TRUSTEE'S RIGHTS IN BANKRUPTCY CASES INVOLVING BANKRUPT CARRIERS, RIGHTS AS AGAINST OLD SHIPPERS, THAT I SHOULD IN EFFECT DISREGARD THE PLAIN WORDS OF THE STATUTE AND INTERPRET N.R.A. AS MEANING THAT ITS REMEDIAL PROVISIONS AND REMEDIES ARE AVAILABLE TO SHIPPERS ONLY IN PROCEEDINGS INVOLVING BANKRUPT CARRIERS.

TENTATIVELY, I DECLINE TO DO THAT. THE GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION DON'T ALLOW ME TO DISREGARD THE PLAIN WORDS OF THE STATUTE. MOREOVER, THE STATUTE ITSELF HAS PROVISIONS THAT INDICATE AN ATTEMPT NOT SO TO LIMIT IT.

THE REMEDIAL PROVISIONS AT ISSUE IN OUR CASE, THESE DEFENSES ARE AVAILABLE TO SHIPPERS AGAINST CARRIERS, OR THOSE WHO REPRESENT THEM, CARRIERS WHO HAVE STOPPED THE BUSINESS OF CARRYING, BUT ARE NOT IN BANKRUPTCY.

CONVERSELY, IF CARRIERS DO GO INTO BANKRUPTCY BUT UTILIZE CHAPTER 11 AND CONTINUE IN BUSINESS, THE STATUTE DOESN'T APPLY TO THEIR CUSTOMERS AND THE RELATIONSHIP BETWEEN THE CARRIER AND THE CUSTOMER.

THERE IS NO LOGICAL EXPLANATION FOR THE TRUSTEE'S ESSENTIAL CONTENTION THAT 541(C)(1)(B) IS INTENDED TO APPLY TO LAWS AFFECTING CERTAIN KINDS OF BANKRUPTCIES,

AND NAMELY CHAPTER 7 WHERE THE SERVICE HAS ENDED BUT NOT OTHER KIND OF BANKRUPTCIES, NAMELY CHAPTER 11 WHERE THE SERVICE IS CONTINUING.

AS AN EXAMPLE OF WHAT I HAVE BEEN SAYING, THERE IS A CASE DECIDED SINCE N.R.A. WAS PASSED CALLED *GROSS*, G-R-O-S-S, *GROSS COMMON CARRIER INCORPORATED* VERSUS *A.B. DICK COMPANY*, D-I-C-K. IT'S NOT YET FED.SUP. IT'S 1993 U.S. DISTRICT COURT LEXIS 18667, DECIDED IN THE NORTHERN DISTRICT OF ILLINOIS ON 12/21/93 BY JUDGE CONLON.

THERE HE POINTS OUT AND HOLDS THAT WHEN A CARRIER IS IN CHAPTER 11 AND STILL TRANSPORTING PROPERTY, N.R.A. DOES NOT APPLY. IF THE TRUSTEE'S VERSION OF N.R.A. IS CORRECT, SUCH A HOLDING COULD NOT HAVE BEEN MADE.

JUDGE CONLON SUSPECTED AND ENFORCED THE LANGUAGE OF THE STATUTE AND ITS LIMITATIONS AS DRAWN, AS WRITTEN, RATHER THAN ATTEMPTING TO READ DIFFERENT MEANINGS INTO IT, WHICH THE WORDS OF THE STATUTE DO NOT CONVEY. I TENTATIVELY WOULD DO THE SAME.

ANOTHER GENERAL OBSERVATION, WHICH AS YOU THINK ABOUT IT, BOLSTERS THE CONSTRUCTION OF THE STATUTE WHICH I HAVE JUST TENTATIVELY ANNOUNCED AS NOT WITHIN THE GROUP OF STATUTES DEFINED WITHIN THE ANTI-FORFEITURE PROVISIONS OF THE BANKRUPTCY ACT.

WHEN YOU LOOK AT THEM, THE ESSENTIAL PURPOSE OF THE ANTIFORFEITURE PROVISIONS THE ESSENTIAL PURPOSE OF 541(C)(1)(B), IS TO MAKE SURE THAT PROPERTY COMES INTO THE HANDS OF THE ESTATE AND IS NOT FORFEITED BY CONTRACT PROVISIONS OR STATE LAWS ENFORCING SUCH PROVISIONS.

SUCH AS, FOR EXAMPLE, THE PROVISIONS OF A LEASE THAT TERMINATED UPON A BANKRUPTCY, TERMINATED IMMEDIATELY UPON THE BANKRUPTCY FILING, AND STATE LAWS THAT WORK THE SAME KIND OF A TERMINATION AND FORFEITURE OF OTHERWISE EXISTING PROPERTY RIGHTS.

THEN CONGRESS SAID IN THOSE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY CODE THAT NEITHER SUCH CONTRACT PROVISIONS, NOR STATE STATUTES, OR EVEN FEDERAL STATUTES ENFORCING THEM WOULD BE ALLOWED TO INTERFERE WITH THAT PROPERTY COMING INTO POSSESSION OF THE TRUSTEE AND INTO THE ESTATE. BUT WHEN YOU LOOK AT N.R.A., IT SEEMS TO ME, N.R.A. DOES NOT HAVE THE SAME EFFECT AND CANNOT BE INTERPRETED AS HAVING THE EFFECT OF PREVENTING PROPERTY FROM COMING INTO AN ESTATE.

N.R.A. HAS ITS EFFECT AFTER THE PROPERTY IS ALREADY IN THE ESTATE BY LIMITING THE TRUSTEE'S RECOVERY ON THE PROPERTY RIGHTS IN VARIOUS WAYS, DEPENDING ON THE CLASS OF CUSTOMER INVOLVED. IF YOU START WITH THE PREMISE THAT THIS IS NOT, N.R.A. IS NOT AN

ANTIFORFEITURE LAW AND THE PROPERTY IS ALREADY IN THE HANDS OF THE ESTATE, IT HAS BEEN A BASIC TENANT OF BANKRUPTCY LAW FOR DECADES. THAT NONBANKRUPTCY LAWS DEFINE THE EXTENT OF THE REMEDY AND HOW IT CAN BE EXERCISED, AND THE EXTENT OF THE PROPERTY RIGHT THAT HAS COME INTO THE ESTATE AND HOW IT CAN EXERCISED. AND THE BANKRUPTCY COURT, EVEN IN ADVERSARY PROCEEDINGS THAT ARE BROUGHT THERE BY A TRUSTEE MUST APPLY THOSE STATE LAWS THAT AFFECT AND DEFINE THE RIGHT.

I THINK THAT'S THE PRINCIPLE TO BE APPLIED HERE. I'M AWARE OF SOME HOLDINGS THAT EVEN SOME CERTAIN FEDERAL LAWS, SUCH AS E.R.I.S.A., FOR EXAMPLE. BUT ONCE YOU START ON THE ASSUMPTION THAT THERE IS NO FORFEITURE IN N.R.A., THEN STATE LAWS THAT DEFINE THE RIGHT OR LIMIT THE RIGHT AND THIS NEW FEDERAL LAW, N.R.A., WHICH LIMITS THE EXERCISE OF THE PROPERTY RIGHTS THAT THE TRUSTEE ALREADY HAS IN THE ESTATE, SUCH LAWS BECOME VALID, APPLICABLE, AND ENFORCEABLE.

NOW, THERE IS ANOTHER ALTERNATIVE GROUND FOR REACHING THIS SAME TENTATIVE RESULT THAT I WANT TO SHARE WITH YOU BRIEFLY.

LET'S ASSUME ARGUENDO THAT I READ N.R.A. THE WAY THE TRUSTEE WANTS ME TO READ IT IN TERMS THAT ITS APPLICATION IS DEPENDENT ON THE FINANCIAL CONDITION OF THE DEBTOR.

ASSUME ARGUENDO THAT MR. GUMPORT IS RIGHT ON THAT ISSUE.

ASSUME FURTHER THAT N.R.A. MEETS ALL OF THE OTHER DEFINITIONAL REQUIREMENTS OF 541(C)(1)(B), EVEN THEN I WOULD REACH THE SAME TENTATIVE RESULT ON THE GROUND THAT CONGRESS HAS IN EFFECT SAID BY ITS LATER ENACTMENT OF N.R.A., LATER THAN THE BANKRUPTCY CODE SECTION AND BY THE SPECIFIC LANGUAGE AND PROVISIONS OF N.R.A., THAT THIS ONE FORFEITURE STATUTE, THIS N.R.A., WILL NOT BE APPLIED TO BANKRUPTCY PROCEEDINGS FOR CARRIERS IN WHICH THE TRUSTEES ARE TRYING TO GET RATE UNDERCHARGES BACK.

CONGRESS HAS SAID THAT IN THAT KIND OF A PROCEEDING, THE REMEDIES THAT IT HAS OUTLINED IN THE NEW STATUTE, N.R.A., WILL GOVERN AND WILL BE APPLIED.

NOW, IF YOU WANT TO CALL THAT A PRO TANTO AMENDMENT OF THE PROVISIONS OF A BANKRUPTCY ACT ON WHICH THE TRUSTEE RELIES, THAT'S OKAY. THAT'S A PROPER WAY TO LOOK AT IT. THE N.R.A. HAS THE EFFECT, EVEN IF I CONSTRUE IT THE WAY THE TRUSTEE WANTS ME TO, OF BEING A PRO TANTO AMENDMENT.

CONGRESS HAS IN EFFECT SAID THIS, "EVERYBODY WE HAVE SAID IN THE BANKRUPTCY ACT ABOUT OTHER FORFEITURE STATUTES STILL APPLY, BUT IF N.R.A., OUR NEW STATUTE, IS CALLED A FORFEITURE STATUTE, IT TRUMPS 541(C)(1)(B) AND IT GOVERNS."

IF YOU TAKE THE TRUSTEE'S VIEW OF N.R.A., THE DEFENDANT I THINK HAS CORRECTLY POINTED OUT THAT CONGRESS HAS PASSED A NEW LAW WITH EITHER NO PURPOSE OR APPLICATION, OR PRACTICALLY NO PURPOSE OR APPLICATION, THERE WOULD BE ALMOST NOTHING LEFT THAT THIS NEW LAW COULD APPLY TO. IT WOULD THEN ONLY APPLY TO A VERY NARROW CLASS OF CARRIERS. WE'RE NOT IN BANKRUPTCY AND ALSO ARE NOT OPERATING ANY LONGER. THAT'S ALL TO WHICH THESE REMEDIAL PROVISIONS WOULD APPLY.

I'M SPEAKING ONLY OF THE REMEDIAL PROVISIONS HERE OF N.R.A. I KNOW THERE ARE SOME OTHER PROVISIONS IN THAT STATUTE THAT HAVE DIFFERENT APPLICATIONS, BUT OUR CASE DOESN'T INVOLVE THOSE OTHER PROVISIONS.

IT WOULD SEEM FOOLHARDY TO TAKE THE TRUSTEE'S CONSTRUCTION OF N.R.A. WHEN THE LEGISLATIVE HISTORY OF IT IS FULL OF INDICATIONS THAT IT WAS INTENDED TO ADDRESS THIS VERY KIND OF ADVERSARY PROCEEDINGS, THE KIND WE'RE DEALING WITH IN THIS CASE.

IF CONGRESS HAD ENACTED A LAW AS NARROW AS THE TRUSTEE WOULD HAVE ME CONSTRUE IT, IT DID NOT ADDRESS AT ALL THE PROBLEM THAT IT WAS TRYING TO ADDRESS AS EVIDENCED BY THE LEGISLATIVE HISTORY.

BEFORE I CALL ON COUNSEL, LET ME DISCUSS BRIEFLY AN ANALYTICALLY DIFFERENT GROUND URGED BY THE TRUSTEE.

THE TRUSTEE SAYS THAT TO READ THE STATUTE THE WAY THE DEFENDANT ASKS ME TO MAKES A MOCKERY OF THE AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY ACT. I'M NOT 100 PERCENT SURE THAT THIS ARGUMENT WHICH THE TRUSTEE MADE WHEN THE OTHER CASE, *GUMPORT* VERSUS *I.C.C.* WAS BEFORE ME, IS BEING STILL MADE TODAY, BUT IF IT IS, I WOULD REJECT THE ARGUMENT.

THIS ISSUE DEALS WITH DEFENSES THAT A DEFENDANT MAY MAKE IN ONGOING LITIGATION BEING ACTIVELY PROSECUTED. I CAN'T SEE HOW IT IS IN ANY WAY IMPLICATED OF STAY PROVISIONS OF THE BANKRUPTCY ACT.

WELL, I HAVE FINISHED ELABORATING THE REASONS FOR THE TENTATIVE DECISION, AND TO SUMMARIZE UNDER IT, I WILL GRANT THE DEFENDANT'S MOTION FOR JUDGMENT AND DENY THE PLAINTIFFS. ONLY DEFENDANT HAS SHOWN ENTITLEMENT AS A MATTER OF LAW.

BUT I WANT TO SAY ONE MORE THING, WHICH YOU CAN TERM OR LOOK AT AS A PERSONAL NOTE OR STATEMENT, IF YOU WISH. I WANT TO SAY IT TO COUNSEL.

I'VE BEEN PART OF THE CONTROVERSY BETWEEN THE BANKRUPTCY TRUSTEES OF BANKRUPT CARRIERS AND THE I.C.C. AND THE CUSTOMERS OF THOSE CARRIERS, AND THE LITIGATION OVER THE RIGHT TO RECAPTURE CHARGES THAT WERE NOT WITHIN THE FILED RATES. SO I HAVE EXPERIENCED AND KNOW SOMETHING ABOUT THE WAY THIS HAS DEVELOPED.

MR. GUMPORT AND OTHER TRUSTEES IN BANKRUPTCY, AT GREAT EFFORT AND EXPENSE, HAVE VINDICATED THE LAW AS IT EXISTED AND HAVE ESTABLISHED THEIR RIGHT TO RECOVER NOT ALL OF THOSE UNDERCHARGES IN ALL CATEGORIES, BUT CERTAINLY SUBSTANTIAL SUMS.

THEY HAVE DONE SO AGAINST THE BITTER OPPOSITION OF THE I.C.C., WHICH, AS THE HISTORY OF THE LAST TWENTY YEARS WILL DISCLOSE, DID A GREAT DEAL, PERHAPS EVERYTHING IN ITS POWER, TO DEREGULATE THE TRUCKING INDUSTRY AT A TIME WHEN THEY WERE NOT ABLE TO SECURE CONGRESSIONAL APPROVAL FOR REPEAL OF THE FILED RATE AND OTHER REGULATIONS.

WHEN THE TRUSTEES WERE ABLE TO SECURE FROM THE COURT SYSTEM, INCLUDING THE SUPREME COURT, A FINAL AND DEFINITIVE VINDICATION OF THEIR POSITION, THE SHIPPERS AND THE I.C.C. HAVE BEEN ABLE THROUGH THE POLITICAL PROCESS, TO CHANGE THAT RESULT BY NEW LEGISLATION.

I CAN CERTAINLY UNDERSTAND THE DISAPPOINTMENT AND UNHAPPINESS OF THE VARIOUS TRUSTEES AND THEIR COUNSEL AND ALSO PERHAPS ON THE PART OF SOME GROUPS OF CREDITORS IN THESE BANKRUPTCIES, BUT THAT DISAPPOINTMENT IS THE PRICE OF A DEMOCRACY.

IF ONE OR A GROUP OF INTERESTS CAN SECURE LEGISLATION WITHIN THE POWER OF CONGRESS TO ENACT LEGISLATION, WHICH MAY DRASTICALLY

LIMIT OR EVEN TAKE AWAY REMEDIES THAT PREVIOUSLY EXISTED, WE MUST ALL ABIDE BY THAT LEGISLATION.

THE QUESTION IS NOT HOW I OR ANYONE ELSE WOULD HAVE VOTED ON THIS LEGISLATION AS A MEMBER OF CONGRESS. THE QUESTION IS NOT WHETHER IT'S WISE OR BAD LEGISLATION. THAT'S ALL BEHIND US. CONGRESS HAS SPOKEN, AND IN MY TENTATIVE VIEW, ITS WORK, THE NEW STATUTE, N.R.A., ENDS OR SUBSTANTIALLY ENDS THE RIGHTS THAT THE TRUSTEES HAD PREVIOUSLY ESTABLISHED FOR RECOVERY OF SUBSTANTIAL SUMS. I SYMPATHIZE, BUT IT IS MY DUTY TO ENFORCE THE LAW.

WE'LL TAKE A FIVE-MINUTE RECESS, AFTER WHICH I WANT TO HEAR FROM MR. GUMPORT FIRST AND THEN COUNSEL FOR THE DEFENDANT AND THE I.C.C.

(RECESS TAKEN AT 10:45 A.M. TO 10:55 A.M.)

THE COURT: MR. GUMPORT, ABOUT HOW MUCH TIME DO YOU THINK YOU NEED?

MR. GUMPORT: YOUR HONOR, I WOULD REQUEST THIRTY MINUTES.

THE COURT: WELL, THAT'S A LITTLE HIGH. I'M GOING TO GIVE YOU TWENTY MINUTES.

MR. GUMPORT: THANK YOU, YOUR HONOR.

THE COURT: COME TO THE PODIUM NOW.

MR. GUMPORT: THANK YOU, YOUR HONOR.

YOUR HONOR, ONE OF YOUR CONCLUDING REMARKS WAS THAT THE BANKRUPTCY TRUSTEES HAD LOST THE POLITICAL PROCESS AND I COULDN'T DISAGREE MORE STRONGLY, THE SHIPPERS AND THE GOVERNMENT –

THE COURT: YOU THINK YOU WON IN CONGRESS?

MR. GUMPORT: WE – YOUR HONOR, THAT IS CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. GUMPORT: WHEN I HEAR THE COURT SAYING IN ITS TENTATIVE FINDING THAT THE COURT WOULD FIND AS AN ALTERNATIVE FINDING THAT THERE WAS A PRO TANTO AMENDMENT OF THE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY CODE, IF MY INTERPRETATION WERE TO BE ACCEPTED, I DID NOT HEAR THE COURT EVER MENTION ONCE SECTION 9 OF THE N.R.A., WHICH EXPRESSLY SAYS THAT NOTHING IN THE N.R.A. SHALL LIMIT OR ALTER THE APPLICATION OF THE PROVISIONS OF TITLE 11 RELATING TO BANKRUPTCY. AND THAT PROVISION IS IN THERE, YOUR HONOR, BECAUSE THE SHIPPERS AND THE GOVERNMENT DID LOSE THE POLITICAL STRUGGLE. THEY DIDN'T GET A LAW THAT AMENDED THE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY AND THE RESULT THAT THEY ASKED FOR WOULD BE AN ABSURD RESULT.

THE COURT: WHAT WAS THE PROBLEM WHICH CONGRESS ADDRESSED AND THOUGHT IT WAS CURING, THEN, BY THIS STATUTE?

MR. GUMPORT: THEY WANTED TO ABSOLUTELY AND COMPLETELY DESTROY ALL FREIGHT UNDERCHARGE CLAIMS ASSERTED BY BANKRUPTCY TRUSTEES, AND I STIPULATE TO THAT. THEY WANTED THAT.

THE COURT: AND YOU'RE SAYING BY THE LANGUAGE OF SECTION 9, THEY HAVE TOTALLY FAILED. IS THAT IT?

MR. GUMPORT: NO, YOUR HONOR. I'M SAYING THAT IN THE LANGUAGE OF SECTION 2, THEY GOT A LAW THAT SAID THAT. AND WHEN THEY TRIED TO GET THAT LAW THROUGH CONGRESS BEGINNING IN 1998, THE JUDICIARY COMMITTEE STOPPED THEM AND SAID, "THIS RELATES TO BANKRUPTCY. YOU'RE NOT GOING TO –

THE COURT: BUT LOOK AT THE LAW AS PASSED.

MR. GUMPORT: YES, YOUR HONOR.

THE COURT: AND AS IT'S PASSED, IT HASN'T ADDRESSED THE PROBLEM. IS THAT WHAT YOU'RE SAYING?

MR. GUMPORT: YOUR HONOR, THAT'S NOT AN EXACT STATEMENT OF WHAT I'M SAYING. WHAT I'M SAYING IS SECTION 2 UNEQUIVOCALLY DESTROYS THE FREIGHT UNDERCHARGE CLAIMS OF BANKRUPT CARRIERS. NO QUESTION ABOUT THAT.

BUT THE ISSUE ISN'T WHETHER SECTION 2 SAYS THAT. I HAVE NEVER SAID THAT SECTION 2 OF THE N.R.A. DOESN'T SAY THAT. IT DOES SAY THAT.

WHAT DID I DO SAY IS THERE ARE TWO OTHER STATUTES THAT THE COURT MUST LOOK AT. ONE OF THEM IS IN THE LAW THAT WAS PASSED. IT WAS SECTION 9 OF THE N.R.A. AND IT WAS PUT IN THERE BECAUSE THE JUDICIARY COMMITTEE SAID TO THE COMMITTEE THAT WAS SPONSORING THIS BILL, "WE WANT TO HAVE HEARINGS ON THE BANKRUPTCY RAMIFICATIONS OF THIS PIECE OF LEGISLATION. WE ARE VERY CONCERNED ABOUT IT. WE WANT HEARINGS ABOUT IT."

CONGRESS WAS COMING TO A CLOSE. THESE PEOPLE WERE NOT GOING TO GET ANY LAW WHATSOEVER IF THERE WERE HEARINGS BEFORE THE HOUSE JUDICIARY COMMITTEE WHICH HAS EXPERTISE ON BANKRUPTCY MATTERS.

AND SO WHAT THEY DID, AND THE COMMITTEE REPORT FROM THE PUBLIC WORKS AND TRANSPORTATION COMMITTEE EXPRESSLY SAYS THIS, IS THEY PUT IN SECTION 9 AT THE LAST MINUTE, AND SECTION 9 SAYS, "THIS LAW DOES NOT ALTER IN ANY WAY THE PROVISIONS OF TITLE 11 RELATING TO BANKRUPTCY." IT IS IMPOSSIBLE TO SAY THAT THIS LAW EFFECTS A PRO TANTO AMENDMENT OF THE ANTIFORFEITURE OF THE BANKRUPTCY.

SO THAT'S SECTION 9. AND THE SHIPPERS AND THE GOVERNMENT WANT THIS COURT TO PUT WHITEOUT OVER THAT PROVISION SAYING, "WELL, NOW, THAT'S A SILLY PROVISION. THE LAW

WOULDN'T MAKE SENSE." AND THEN WE GET TO THE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY CODE AND THOSE LAWS ARE STILL IN EFFECT.

AND, YOUR HONOR, IT'S NOT A SURPRISE THAT THERE WERE LEGISLATORS STANDING ON THE FLOOR OF THE HOUSE SAYING, "THIS LAW DESTROYS THE FREIGHT UNDERCHARGE CLAIMS OF BANKRUPTCY TRUSTEES BECAUSE SECTION 2 SAYS THAT AND THEY HAD NEVER CONSIDERED WHETHER THERE WAS ANYTHING IN THE BANKRUPTCY CODE TO PREVENT THAT FROM HAPPENING BECAUSE THE LEGISLATIVE HISTORY IS UNEQUIVOCAL. NOBODY THOUGHT ABOUT IT. NOBODY ADDRESSED THE BANKRUPTCY CODE BECAUSE THEY HAD MADE AN EXPRESSED DEAL IN THE LANGUAGE OF THE STATUTE AND IN THE LEGISLATIVE HISTORY AND ON THE FLOOR OF THE HOUSE SAYING, "WE ARE NOT IN ANY WAY ALTERING TITLE 11," AND THERE WERE NO HEARINGS. IF THERE WERE HEARINGS BEFORE THE HOUSE JUDICIARY COMMITTEE, YOU CAN BET SOMEONE WHO WOULD HAVE POINTED OUT THE INCONSISTENCIES BETWEEN THIS PROVISION OF SECTION 2 AND THE BANKRUPTCY CODE.

THE COURT: JUST A SECOND.

YOU'RE SAYING THIS LEGISLATION WAS PASSED TO AFFORD RELIEF TO THE THOUSANDS OR HUNDREDS OF THOUSANDS OF PEOPLE BEING SUED IN CASES LIKE YOURS, BUT CONGRESS, BY VIRTUE OF

SECTION 9, TOTALLY FAILED TO PROVIDE THEM ANY RELIEF.

ISN'T THAT WHAT YOU'RE SAYING?

MR. GUMPORT: I DON'T SAY, "TOTALLY," YOUR HONOR. THERE'S NINE PROVISIONS OF THE BILL AND I SAY EIGHT OF THEM ARE JUST FINE AND DANDY.

AND AS TO SECTION 2, I SAY AS APPLIED TO CARRIERS THAT ARE IN BANKRUPTCY, IT IS UNENFORCEABLE BY REASON OF THE ANTIFORFEITURE PROVISIONS OF THE LAW.

AND THIS COURT – I HAVE HEARD THIS COURT SAY, "THIS WOULD ONLY APPLY TO MINUSCULE NUMBER OF CARRIERS." THERE IS NOTHING IN THE RECORD BEFORE THIS COURT AS TO HOW MANY CARRIERS ARE OUTSIDE OF BANKRUPTCY PURSUING FREIGHT UNDERCHARGE CLAIMS.

I KNOW THAT THERE ARE SUCH CARRIERS. I DON'T KNOW HOW MANY, YOUR HONOR, BUT YOU HAVE NO EVIDENCE ON THAT ISSUE WHATSOEVER.

SO ONE OF THE FACTUAL PRESUPPOSITIONS OF YOUR CONCLUSION THAT THIS LAW WOULD HAVE AN ABSURD RESULT ISN'T THERE. IT ISN'T IN THE RECORD, YOUR HONOR. AND I WANT TO EMPHASIZE THAT, SO WE HAVE TO THREE PROVISIONS THAT HAVE TO BE CONSIDERED.

I SAY SECTION 2 MEANS WHAT IT SAYS. I DON'T DISPUTE THAT. I DON'T TRY TO POUR WHITEOUT OVER SECTION 2. IT DOES TRY TO FORFEIT AND MODIFY THE ASSETS OF BANKRUPT CARRIERS. I

ACKNOWLEDGE THAT, BUT WHAT I SAY IS SECTION 9 SAYS WHAT IT SAYS. IT SAYS THE OPPOSITE OF "WE'RE AFFECTING A PRO TANTO AMENDMENT OF THE BANKRUPTCY CODE."

IT SAYS, "WE'RE NOT CHANGING THE BANKRUPTCY CODE IN ANY WAY, SHAPE OR FORM." AND THAT WAS PUT IN THERE BECAUSE AS PART OF THE POLITICAL PROCESS, THE CHAIR OF THE JUDICIARY COMMITTEE AND THE CHAIR OF THE PUBLIC WORKS AND TRANSPORTATION COMMITTEE SAID, "THAT'S WHAT WE'RE DOING." THAT'S WHAT-WE'RE DOING.

AND THE CHAIR OF THE HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE STOOD ON THE FLOOR OF THE HOUSE THE DAY THAT THIS BILL WAS VOTED ON BY THE HOUSE AND SAID, "I WANT TO POINT OUT THAT OUR COMMITTEE HAS NO JURISDICTION OVER BANKRUPTCY MATTERS AND WE ARE NOT AMENDING THE BANKRUPTCY CODE."

THE COURT CANNOT FIND THAT THERE IS A PRO TANTO AMENDMENT OF THE BANKRUPTCY CODE AND THEY LOST POLITICAL PROCESS. IF THEY WANT TO GET RID OF SECTION 9 OF THE N.R.A., THEY HAVE TO GO BACK TO CONGRESS. NOT THIS COURT. THIS COURT IS GIVING THEM SOMETHING THAT THEY DIDN'T GET.

AND THE ABSURDITY PRINCIPLE, YOUR HONOR, IS ONLY THERE TO EFFECTUATE CONGRESSIONAL INTENT. THAT'S *R.T.C.* VERSUS *WESTGATE*, THE CASE CITED BY THE OTHER SIDE.

THE COURT CAN'T REWRITE THE STATUTE TO GIVE THEM SOMETHING THEY DIDN'T GET. AND WHEN THE CHAIR OF THE COMMITTEE AND THE COMMITTEE REPORT AND THE STATUTE ITSELF SAYS, "WE'RE NOT AMENDING TITLE 11," THE COURT CAN'T USE THE ABSURDITY PRINCIPLE TO REWRITE THE STATUTE TO GIVE THEM SOMETHING THAT CONGRESS DIDN'T INTEND AND DIDN'T SAY IT WAS TRYING TO GET."

MOREOVER, THAT ARGUMENT, YOUR HONOR, IS CIRCULAR, BECAUSE THE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY CODE EXPRESSLY PROVIDE AS THE COURT POINTED OUT, THAT THEY INVALIDATE OTHERWISE APPLICABLE LAWS. AND THEIR ARGUMENT ISN'T REALLY AN ABSURDITY ARGUMENT. IT'S AN ATTEMPT TO SUBSTITUTE THE POLICY DECISION OR THE POLICY DECISION REFLECTED BY THE ANTIFORFEITURE STATUTES.

THE ANTIFORFEITURE STATUTES REPRESENT A CONGRESSIONAL JUDGMENT THAT IN CERTAIN SITUATIONS, DULY-ENACTED LAWS WOULD BE UNENFORCEABLE. IF YOU ACCEPT THEIR ABSURDITY PRINCIPLE, UNDERLYING IT IS THE PRESUPPOSITION THAT IT WOULD ALWAYS BE ABSURD FOR CONGRESS TO ENACT THE LAW THAT WOULD BE UNENFORCEABLE. BUT CONGRESS HAS DECIDED THE OPPOSITE IN THE ANTIFORFEITURE LAWS. IT'S NOT ABSURD, BECAUSE CONGRESS HAS SAID IT'S NOT ABSURD, AND THAT IS PART OF THE POLITICAL PROCESS THAT BANKRUPTCY TRUSTEES WON IN 1978 AND IT'S NEVER CHANGED SINCE THEN, YOUR HONOR.

NOW, LET ME TALK ABOUT THE ANTIFORFEITURE PROVISIONS OF THE BANKRUPTCY CODE, BECAUSE THAT WAS THE FIRST ROUND OF THE COURT'S TENTATIVE DECISION.

THE COURT FOCUSED ON 541(C)(1)(B) OF THE BANKRUPTCY CODE AND I THINK THAT THAT CONTRIBUTES TO LOSING SIGHT OF THE BREADTH OF THE ANTIFORFEITURE PROVISIONS, YOUR HONOR. THROUGHOUT THIS CASE, THE OTHER SIDE HAS BEEN TRYING TO PRESENT THESE ANTIFORFEITURE PROVISIONS AS NARROW, BUT THEY ARE NOT NARROW, YOUR HONOR. THEY ARE NOT LIMITED TO BANKRUPTCY AND I HAVE NEVER EVER SAID THAT THE N.R.A. IS UNENFORCEABLE BECAUSE IT SHOULD BE READ AS THOUGH IT HAS THE WORD BANKRUPTCY IN IT.

THE WORDS OF THE STATUTE ARE DISJUNCTIVE. THEY PROTECT AGAINST FORFEITURES TRIGGERED BY INSOLVENCY, AND I DON'T RELY ON THAT.

IT PROTECTS AGAINST FORFEITURE TRIGGERED BY BANKRUPTCY AND I DO NOT RELY ON THAT.

IT PROTECTS AGAINST FORFEITURES CAUSED BY RECEIVERSHIP. I DON'T RELY ON THAT.

IT ALSO PROTECTS AGAINST FORFEITURES CAUSED BY FINANCIAL CONDITION, AND I DO RELY ON THAT AND CONGRESS USED THOSE FRAUD (SIC) DISJUNCTIVE TERMS TO MAKE SURE THAT THIS KIND OF LEGISLATION, THIS KIND OF LOOPHOLE, DIDN'T EXIST.

AND IF THE COURT ADOPTS THEIR REASONING, EVERY LANDLORD AND EVERY CONTRACTING PARTY WITH POWER AND OF MAJOR CREDITOR IS GOING TO PUT A CLAUSE IN SAYING, "IF YOUR BUSINESS SHUTS DOWN, YOUR LEASE DISAPPEARS. YOUR CAR GETS REPOSSESSED. I GET EVERYTHING IN YOUR BANK ACCOUNT." IT WILL DEVASTATE THE ESTATES OF BANKRUPT PEOPLE. IT'S A LOOPHOLE. IT MEANS FINANCIAL CONDITION.

NOW, THESE ANTIFORFEITURE PROVISIONS, YOUR HONOR, ALSO HAVE VAST TEMPORAL BREADTH. THERE – AREN'T JUST TWO PROVISIONS IN THE BANKRUPTCY CODE RELATING TO FORFEITURES. THERE'S FOUR. I RELY ON TWO OF THEM, BUT THERE ARE FOUR OF THEM.

541(C)(1)(B) PREVENTS FORFEITURES THAT WOULD PREVENT PROPERTY OF A DEBTOR FROM COMING INTO THE BANKRUPTCY ESTATE. BUT 363(L) PREVENTS FORFEITURES THAT PREVENT THE TRUSTEE FROM USING PROPERTY UNDER 363(B) AFTER NOTICING HEARING, OR FROM USING PROPERTY IN THE ORDINARY COURSE OF BUSINESS, AND THEREFORE, IT RUNS THE FULL GAMUT OF ALL POSSIBLE USES OF ESTATE PROPERTY DURING THE BANKRUPTCY CASE.

IN FACT, IN THIS CASE, *STERLING* INITIALLY SAID, "WELL, THE TRUSTEE ISN'T USING THESE UNDERCHARGES AFTER NOTICING HEARING WITHIN THE MEANING OF 363(B), SO HE IS NOT ENTITLED TO THE PROTECTION OF 363(L)."

AND I POINTED OUT THAT WE ARE SETTLING THESE FREIGHT UNDERCHARGE CLAIMS AFTER NOTICING HEARING. WE ARE COMPENSATING OUR PROFESSIONALS WHO ARE PURSUING THESE CLAIMS ON A CONTINGENCY FEE BASIS AFTER NOTICE AND HEARING. WE ARE PAYING IMPORTANT CLAIMS AGAINST THE ESTATE AFTER NOTICING HEARING WITH THE PROCEEDS OF THESE FREIGHT UNDERCHARGE FUNDS, SO WE ARE USING THEM UNDER 363(B).

AND THEN *STERLING PRESS* COMES BACK AND SAYS, "NO, NO, NO. YOU'RE REALLY USING THEM IN THE ORDINARY COURSE OF BUSINESS, AND SINCE YOU DON'T HAVE AUTHORITY TO OPERATE THE BUSINESS, YOU CAN'T USE THEM, SO YOU AREN'T USING THEM UNDER 363(C)(l)."

AND THEN WE CAME BACK, AND AS WE DEMONSTRATED TO THE COURT, THERE IS AN ORDER, JULY 5, 1990, SAYING THE TRUSTEE IS AUTHORIZED TO OPERATE THE BUSINESS SO THAT TO THE EXTENT THESE FREIGHT UNDERCHARGE CLAIMS ARE BEING USED IN THE ORDINARY COURSE OF BUSINESS, THEY COME RIGHT WITHIN 363(C)(1). AND UNDER 1142, EVEN AFTER A DEBTOR COMES OUT OF BANKRUPTCY, A DEBTOR IS ENTITLED TO USE PROPERTY OF THE ESTATE NOTWITHSTANDING ANY OTHER LAW CONDITIONED ON THE FINANCIAL CONDITION OF THE DEBTOR UNDER A PLAN OF REORGANIZATION.

AND IN THREE –

THE COURT: WHAT IS THE MAIN THRUST OF THIS DETAILED EXAMINATION OF VARIOUS BANKRUPTCY CODE PROVISIONS?

MR. GUMPORT: YOUR HONOR –

THE COURT: WHAT'S THE ESSENTIAL POINT YOU ARE MAKING?

MR. GUMPORT: THE ESSENTIAL POINT I'M MAKING, YOUR HONOR, IS THAT THERE IS NO LOOPHOLE OR CRACK THAT CONGRESS INTENDED TO PERMIT IN ANY OF THESE ANTIFORFEITURE PROVISIONS. AND I WANT TO EMPHASIZE NOW THAT WHEN WE GET TO FINANCIAL CONDITION, THIS STATUTE FITS SQUARELY WITHIN THE ANTIFORFEITURE PROVISIONS REGARDLESS OF WHETHER THE N.R.A. OPERATES TO PREVENT THE CLAIMS FROM COMING INTO THE ESTATE, OR REGARDLESS OF WHETHER THE N.R.A. OPERATES TO PREVENT THE USE OF THOSE CLAIMS DURING THE BANKRUPTCY –

THE COURT: YOU ARE GOING A LITTLE FAST. FOR THE REPORTER'S SAKE, JUST SLOW DOWN A LITTLE BIT.

MR. GUMPORT: ALL RIGHT.

NOW, LET ME TALK ABOUT WHY THE N.R.A. IS CLEARLY CONDITIONED ON THE FINANCIAL CONDITION OF TRANSCON LINES.

YOUR HONOR, ONE OF THE KEY PROVISIONS IN THE N.R.A. IS THE PROVISION SAYING THAT ESSENTIALLY, SMALL BUSINESS CONCERNS AND OTHER SHIPPERS CAN PAY EITHER NONE OR REDUCED PERCENTAGE OF THEIR FREIGHT UNDERCHARGE LIABILITY IF THE MOTOR CARRIER OF FREIGHT IS NO LONGER TRANSPORTING PROPERTY. IT ALSO SAYS THAT THIS ALSO APPLIES IF THE MOTOR CARRIER FREIGHT TRANSPORTING PROPERTY FOR THE PURPOSES OF EVADING THE APPLICATION OF THIS ACT.

I REPRESENT TO YOU, YOUR HONOR, I'M THE TRUSTEE OF TRANSCON LINES AND I HAVE THIS PEN IN MY LEFT HAND AND I'M TAKING A QUARTER FROM THE POCKET OF LEONARD GUMPORT, AN INDIVIDUAL, AND I'M PAYING IT INTO THE TRANSCON ESTATE TO PAY FOR THIS PEN TO BE TRANSPORTED BY TRANSCON LINES TRUSTEE TO MR. GUMPORT'S RIGHT HAND. AND I AM NOW – TRANSCON IS NOW IN THE BUSINESS, YOUR HONOR, OF TRANSPORTING FREIGHT. AND I'M HERE AND YOU'RE SEEING IT HAPPEN AND A QUARTER JUST CAME INTO THE ESTATE OF TRANSCON LINES.

THIS QUARTER RELATES TO THE FINANCES OF TRANSCON LINES AND YOU AND I BOTH KNOW THAT YOU WOULD HAVE TO FIND THAT TRANSCON LINES IS OPERATING FOR THE PURPOSES OF EVADING SECTION 2 OF THE N.R.A., AND I DON'T DENY IT. THERE IS ONLY ONE WAY THAT YOU KNOW THAT. YOU'RE LOOKING AT THIS QUARTER AND YOU'RE SAYING, "THAT'S TOO SMALL." YOU'RE LOOKING AT THIS PEN AND YOU'RE SAYING, "THIS IS A DIME." THE FINANCES ARE SO DIMINUTIVE, I

FIND THAT YOU'RE EVADING THE APPLICATION OF THE N.R.A., AND THAT IS LOOKING AT THE FINANCES OF THE COMPANY.

MORE IMPORTANTLY, YOUR HONOR, IN A SUMMARY JUDGMENT, IF THERE IS ONLY EVIDENCE ON ONE SIDE, IT'S AWFULLY HARD TO RULE FOR THE OTHER SIDE. AND WE DID PUT IN THE DECLARATION OF MR. CHELLIAH, WHOSE EXPERT TESTIMONY AS A CERTIFIED PUBLIC ACCOUNTANT, IS THAT IT IS RECOGNIZED THAT IN THE KEY DOCUMENT DEPICTING THE FINANCIAL CONDITION OF A COMPANY; NAMELY, A AUDITED FINANCIAL STATEMENT, THE FACT THAT A COMPANY WAS NO LONGER IN BUSINESS WOULD HAVE TO BE PRESENTED AS PART OF THE FINANCIAL STATEMENT BECAUSE IT RELATES TO THE FINANCIAL CONDITION OF THE COMPANY. AND THAT EVIDENCE WASN'T OBJECTED TO. IT'S BEEN ADMITTED. IT WASN'T REBUTTED. IT WASN'T EVEN CONTROVERTED, YOUR HONOR. THERE IS ONLY EVIDENCE ON ONE SIDE ON THE FINANCIAL CONDITION ISSUE.

NOW, YOUR HONOR SEEMED TO THINK THAT I'M ATTACKING. I'M TRYING TO GO BEHIND THE LANGUAGE OF THE N.R.A. IN SAYING THAT THE STATUTE REALLY RELATES TO THE FINANCIAL CONDITION OF TRANSCON LINES, AND THAT IS NOT ACCURATE, YOUR HONOR. I RELY ON THE STATUTORY LANGUAGE OF THE N.R.A.

IT IS MY POSITION THAT THE STATUTE UNEQUIVOCALLY RELATES TO THE FINANCIAL

CONDITION OF THE COMPANY. WHY? BECAUSE BY DEFINITION, WHEN A MOTOR CARRIER OF FREIGHT IS NOT TRANSPORTING FREIGHT, IT HAS NO REVENUES FROM CURRENT OPERATIONS. AND THERE ISN'T A DICHOTOMY BETWEEN OPERATIONS AND FINANCIAL CONDITIONS. THAT'S A FALSE SEPARATION. WE ALL KNOW THAT REVENUES, PROFITS, INCOME, CASH FLOW RELATE DIRECTLY TO THE OPERATIONS OF THE COMPANY, BUT THEY RELATE EQUALLY TO THE FINANCIAL CONDITION.

AND YOUR HONOR, IF A DEFENDANT CAME INTO THIS CASE BEING SUED FOR SECURITIES FRAUD BECAUSE HE WAS SELLING SECURITIES IN, LET'S TAKE A TRUCKING COMPANY, TO LITTLE OLD LADIES, SAYING "BUY SOME STOCK IN IT," AND HE DIDN'T DISCLOSE THAT THAT COMPANY HAD SHUT DOWN, I THINK THIS COURT WOULD BE ALARMED AND THE JURORS SITTING OVER THERE WOULD BE ALARMED TO HEAR HIM SAYING, "WELL, I HEARD THAT JUDGE HILL SAID THAT WHETHER A BUSINESS IS SHUT DOWN OR NOT HAS NOTHING TO DO WITH ITS FINANCIAL CONDITION, SO WHY SHOULD I DISCLOSE TO YOU THAT IT'S BEEN SHUT DOWN? THAT'S NOT MATERIAL." IT'S NOT TRUE AND WE KNOW THAT IT'S NOT TRUE.

MOREOVER, THIS CONCLUSION IS REINFORCED BY THE FACT THAT THE FULL STATUTORY DEFINITION OF MOTOR CARRIER IN N.R.A. ISN'T SIMPLY THE WORD "MOTOR CARRIER." IT'S MOTOR CARRIER FOR COMPENSATION. THAT APPEARS IN SECTION 10102.(15) OF THE INTERSTATE COMMERCE

ACT. AND THE N.R.A. MERELY SUPPLEMENTS THE PREEXISTING INTERSTATE COMMERCE ACT.

SO WHEN THE STATUTE SAYS THAT IT'S TRIGGERED BY THE TERMINATION OF THE BUSINESS OF A MOTOR CARRIER OF FREIGHT, IT REALLY SAYS ON ITS FACE THAT IT IS TRIGGERED BY THE TERMINATION OF THE BUSINESS OF A MOTOR CARRIER OF COMPENSATION AND THAT UNDERLINES AND SPADES THE FACT, YOUR HONOR, THAT IT'S DESCRIBING A BUSINESS THAT WAS IN THE BUSINESS FOR COMPENSATION THAT IS NO LONGER GENERATING COMPENSATION. THAT'S RIGHT ON THE FACE OF THE STATUTE, YOUR HONOR.

NOW, THE COURT ALSO EMPHASIZED THAT I'M TRYING TO HAVE THIS STATUTE READ AS THOUGH THE WORD MEANS BANKRUPTCY. I DON'T. AND THAT'S ONE OF THE REASONS WHY I WAS EMPHASIZING THE BREADTH OF THE ANTIFORFEITURE PROVISIONS. BECAUSE I DON'T HAVE TO SHOW THAT THE WORDS REALLY MEAN BANKRUPTCY. I DON'T HAVE TO SHOW THAT THE WORDS REALLY MEAN INSOLVENCY. I DON'T HAVE TO SHOW THAT THE WORDS REALLY MEAN RECEIVERSHIP. ALL I HAVE TO DO IS SHOW THAT THE STATUTE IS TIED TO THE FINANCIAL CONDITION, WHICH IS ONE OF FOUR ALTERNATIVE TESTS THAT'S IN THE ANTIFORFEITURE PROVISIONS. AND WE DO THAT, YOUR HONOR.

BUT YOUR HONOR, THE LEGISLATIVE HISTORY IS QUITE CLEAR. FOR THE SAME REASON THAT THIS COURT IS TEMPTED TO FIND THAT IT'S JUST GOT TO

POUR A CAN OF WHITEOUT ON SECTION 9 OF THE N.R.A. AND GIVE THE SHIPPERS A BETTER LOG THAN THEY'VE REALLY GOT. I AGREE THAT WHEN YOU LOOK AT THE LEGISLATIVE HISTORY, THERE IS NO QUESTION THAT THEY WERE TARGETING BANKRUPT CARRIERS. I AGREE BECAUSE I THINK SECTION 2 MEANS WHAT IT SAYS, AND I THINK THAT WE –

THE COURT: BY THE WAY, 541(C)(1)(B) DOESN'T TALK ABOUT BEING TIED TO FINANCIAL CONDITION. IT TALKS ABOUT A STATUTE THAT IS CONDITIONED ON THE INSOLVENCY OR FINANCIAL CONDITION.

MR. GUMPORT: YES.

THE COURT: NOW, THAT'S SOMETHING QUITE DIFFERENT.

MR. GUMPORT: YOUR HONOR –

THE COURT: HOW IS THIS ONE CONDITIONED UPON THE INSOLVENCY OR FINANCIAL CONDITION?

MR. GUMPORT: IT'S CONDITIONED ON THE FINANCIAL CONDITION BECAUSE THE REDUCTIONS IN THE LIABILITY OF SHIPPERS ARE TRIGGERED ONLY BY ESTABLISHING THE PREDICATE FACTS IN SECTION 2-A OF THE N.R.A., WHICH SAYS THAT IT ONLY APPLIES IF THE MOTOR CARRIER FREIGHT IS NO LONGER TRANSPORTING FREIGHT, SO THAT'S A CONDITION. SECTION 2-A IS A CONDITION PRECEDENT TO THE APPLICATION OF THE MANDATORY REDUCTIONS IN THE N.R.A.

THE COURT: THE WORD "FINANCIAL CONDITION" IS USED IN CONJUNCTION WITH INSOLVENCY. AND WHAT YOU ARE SAYING TO ME IS THAT IF YOU ARE NO LONGER – IF YOU'RE A CARRIER, BUT NO LONGER CARRYING, THAT REALLY IS GOING TO HAVE SOME EFFECT ON YOUR FINANCIAL CONDITION AND THAT PEOPLE EXTENDING CREDIT WOULD THINK ABOUT IT, BUT TO ME IT SEEMS THAT'S A LONG WAY FROM SATISFYING THE WORDING OF THE STATUTE, "CONDITIONED UPON THE INSOLVENCY OR FINANCIAL CONDITION."

MR. GUMPORT: YOUR HONOR, THINK ABOUT HOW YOU WOULD FEEL IF I SOLD YOU SOME STOCK IN A COMPANY WITHOUT TELLING YOU THAT THAT BUSINESS HAD SHUT DOWN AND THEN I'D HAVE THE GALL TO TELL YOU THAT HAD NOTHING TO DO WITH THE FINANCIAL CONDITION. I THINK I WOULD SPEND THE NIGHT IN JAIL WITH MY TOOTHBRUSH. IT DOES RELATE TO THE FINANCIAL CONDITION, YOUR HONOR, AND IT BLINKS REALITY TO SAY THAT IT DOESN'T. IT REALLY DOES. IF A BUSINESS HAS NO REVENUES –

LET ME GIVE YOU SOME OTHER EXAMPLES. I'M SURE YOUR HONOR HAS SEEN SOME VERY COMPLICATED LOAN AGREEMENTS WITH ALL KINDS OF DEFAULT CLAUSES IN IT, AND THERE ARE THE TYPES OF THINGS LIKE YOUR REVENUES, YOUR VOLUME.

LET'S TAKE A SHOPPING CENTER TENANT. THERE ARE ALL KINDS OF MULTIPLE MULTIFARIOUS COGNATES WHICH ARE ALL DESIGNED TO

ENSURE THAT THERE IS A LUCRATIVE TENANT IN THERE. AND THEY TALK ABOUT THE AMOUNT OF BUSINESS YOU GENERATE AND HOW MANY COOKIES YOU SELL, AND WHAT YOUR PROFITS ARE, AND ALL THESE THINGS RELATE TO FINANCIAL CONDITIONS. AND CONGRESS WAS DELIBERATELY BROAD IN THESE ANTIFORFEITURE PROVISIONS PRECISELY SO THAT THESE KINDS OF CLEVER LITTLE DRAFTING SCHEMES WOULDN'T SUCCEED.

THE COURT: VERY WELL.

I DON'T THINK WE CAN GO ANY FURTHER IN DEBATING WHETHER N.R.A. IS A STATUTE CONDITIONED UPON, BUT THAT'S WHAT THE COURT WOULD HAVE TO FIND.

NOW, YOUR TIME HAS EXPIRED. I'LL GIVE YOU A MINUTE TO FINISH UP. WHETHER YOU WON OR LOST THE POLITICAL BATTLE AND WHAT SECTION 9 IS ALL ABOUT.

MR. DICKERSON: I WOULD LIKE TO DO THAT, YOUR HONOR. THANK YOU.

I HAVE ESSENTIALLY FOUR RESPONSES TO WHAT MR. GUMPORT HAD TO SAY ABOUT SECTION 9, AND I WANT TO TREAT THEM EACH SEPARATELY.

THE COURT: I HOPE THAT YOU WILL NOT NEED 20 MINUTES.

MR. DICKERSON: I WILL NOT NEED 20 MINUTES, YOUR HONOR. IN FACT, I'M THINKING I'M NEEDING CLOSER TO FIVE, MAYBE SEVEN MINUTES.

THE COURT: GO RIGHT AHEAD.

MR. DICKERSON: THANK YOU.

THE FIRST RESPONSE IS MR. GUMPORT SEEMS TO BELIEVE THAT THE – IF A BUSINESS IS NOT OPERATING – IN THIS PARTICULAR CASE – LET'S TAKE THIS PARTICULAR CASE.

IF A MOTOR CARRIER IS NOT OPERATING, THAT MEANS THAT AFFECTS THEIR FINANCIAL CONDITION, YET THAT DOES NOT REFLECT EVERY DAY EXPERIENCE.

GIVE YOU TWO EXCELLENT EXAMPLES:

NO. 1, THE SINGER CORPORATION. FOR OVER A CENTURY, THE SINGER CORPORATION MANUFACTURED SEWING MACHINES, INVENTED THE WHOLE CATEGORY.

IN 1985, SINGLY EXITED THAT BUSINESS. THEY WERE NO LONGER A MAKER OF SEWING MACHINES. IS THERE ANYTHING WRONG WITH THE SINGER CORPORATION TODAY? NO. THE FACT THAT THEY DO NOT MAKE SEWING MACHINES DOES NOT CHANGE THE FACT THAT THEY ARE ONE OF THE LARGEST AND MOST EFFECTIVE DEFENSE CONTRACTORS THAT WE HAVE.

SECONDLY – SO THE POINT I HAVE HERE IS THAT A BUSINESS COULD SIMPLY WITHDRAW THAT CATEGORY AND STILL BE IN FINE CONDITION.

AND IN TERMS OF MOTOR CARRIERS, I'LL GIVE YOU AN EXAMPLE. A & R FREIGHT IS OWNED BY

THE COASTAL CORPORATION, ONE OF THE LARGEST NATURAL GAS COMPANIES IN THIS COUNTRY. I'M NOT SAYING THAT THEY WOULD, BUT IT'S CERTAINLY POSSIBLE THAT A & R – PARDON ME, COASTAL COULD DECIDE TO EXIT THAT BUSINESS. MAYBE SHUT DOWN A & R. MAYBE THEY WOULD SELL OFF A & R. THEY WOULD NO LONGER BE TRANSPORTING PROPERTY IF THEY SIMPLY SOLD OFF THE ASSETS.

THE COURT: THE POINT YOU ARE MAKING IS THAT A CARRIER STOPPING CARRIAGE DOES NOT NECESSARILY IMPAIR THE FINANCIAL HEALTH OF EITHER THAT COMPANY –

MR. DICKERSON: EXACTLY.

THE COURT: – OR ITS PARENT COMPANY IF IT'S PART OF A CONGLOMERATE, THEN THAT'S SELF-EVIDENT.

MR. DICKERSON: RIGHT.

THE COURT: WHAT DO YOU SAY TO THE ARGUMENT THAT THIS STATUTE MUST REALISTICALLY BE READ AS ONE CONDITIONED UPON THE FINANCIAL CONDITION INSOLVENCY OF THE COMPANY?

MR. DICKERSON: I DON'T THINK – IF I UNDERSTAND YOUR QUESTION APPROPRIATELY, YOUR HONOR.

THE COURT: THAT'S WHAT HE IS REALLY ARGUING TODAY.

MR. DICKERSON: YEAH, I UNDERSTAND THAT.

TWO POINTS. ONE, HE MAKES THE POINT – AND I'M GOING TO HAVE TO TRY AND GO THROUGH THIS –

THE COURT: WHY DON'T YOU DO THIS FOR ME TO HELP FRAME MY THINKING. WHY DON'T YOU SPEAK RIGHT NOW ABOUT SECTION 9.

MR. DICKERSON: ALL RIGHT.

THE COURT: AND HOW THE COURT SHOULD LOOK AT IT AND WHAT EFFECT, IF ANY, SHOULD BE GIVEN TO IT IN THE CONTEXT OF TODAY'S ISSUES.

MR. DICKERSON: RIGHT.

NO. 2, I AGREE WITH MR. GUMPORT INASMUCH AS THERE WERE NO HEARINGS HELD AND THERE IS NOT MUCH IN THE WAY OF LEGISLATIVE HISTORY AS TO WHAT SECTION 9 MEANS.

HOWEVER, TWO POINTS. NO. 1, THE NEGOTIATED RATES ACT IS NOT SIMPLY A QUESTION OF SECTION 2 AND WHAT SECTION 2 DOES. THERE ARE OTHER PROVISIONS.

THIS WAS RECOGNIZED IN THE CASE THAT WAS FILED THIS MORNING BY THE INTERSTATE COMMERCE COMMISSION, *JONES TRUCK LINES* VERSUS *AVCO STEEL* (PH). AND I QUOTE FROM THE BOTTOM OF PAGE 17 AND THE TOP OF PAGE 18 OF THAT DECISION:

> "RATHER, A MORE PLAUSIBLE VIEW OF THE LEGISLATIVE HISTORY REVEALS THAT SECTION 9 WAS INCLUDED TO CLARIFY THE

JURISDICTION OF THE BANKRUPTCY COURT'S VIS-A-VIS THE JURISDICTION OF THE I.C.C."

THAT IS SIGNIFICANT BECAUSE LATER, PRIOR TO SECTION 9, EARLIER IN THE NEGOTIATED RATES ACT, IT PROVIDES THAT CERTAIN MATTERS WERE TO BE REFERRED TO THE INTERSTATE COMMERCE COMMISSION, AND THEREFORE, IT MAKES MORE SENSE TO SAY THAT SECTION 9 WAS MORE OF A JURISDICTIONAL QUESTION DEALING WITH HOW THESE MATTERS SHOULD BEGIN WITH AND WAS NOT MEANT TO AFFECT SECTION 2 WHATSOEVER.

AND TO UNDERSCORE THAT POINT, I WOULD POINT OUT THAT WE STILL GET BACK TO THE DEFINITION OF PROPERTY. PROPERTY IS NOT DEFINED IN THE BANKRUPTCY CODE. PROPERTY IS DEFINED, AS THIS COURT RECOGNIZED, OUTSIDE OF THE BANKRUPTCY CODE BY NONBANKRUPTCY LAW. THE PROPERTY IN QUESTION HERE ARE THE UNDERCHARGED CLAIMS CREATED UNDER TITLE 49.

INASMUCH AS THE PROPERTY ITSELF IS CREATED AND ITS RIGHTS ATTENDANT THERETO ARE CREATED OUTSIDE OF THE BANKRUPTCY CODE, TO SAY AS SECTION 9 DOES THAT WE ARE NOT GOING TO AFFECT BANKRUPTCY LAW DOES NOT AFFECT THESE CAUSES OF ACTION ONE WAY OR THE OTHER.

IT IS NOT NECESSARY TO AFFECT AN AMENDMENT OF THE BANKRUPTCY CODE IN ORDER TO CHANGE OR TO LIMIT THE TRUSTEE'S RECOVERY IN

THESE CASES, SO I DON'T THINK THAT THE SECTION 9 ARGUMENT HAS ANY APPLICATION TO THIS DISPUTE WHATSOEVER.

FINALLY, AS THIS COURT ALSO POINTED OUT EVEN IF IT WERE TRUE THAT THERE WAS A CONFLICT HERE – AND SECTION 9, THE CASE LAW IS VERY CLEAR THAT IF YOU'RE GOING TO HAVE – THAT A LATER SPECIFIC STATUTE WILL OVERRULE A GENERAL EARLIER STATUTE.

THE COURT: WE ARE ALL CONVERSANT WITH THAT.

MR. DICKERSON: THERE'S AN IMPORTANT CAVEAT TO THAT, YOUR HONOR, THAT I WANT TO UNDERSCORE HERE.

THE COURT: JUST A SECOND

MR. DICKERSON: YES.

THE COURT: HOW DOES THAT RELATE TO WHAT SECTION 9 MEANS AND WHAT EFFECT I SHOULD GIVE IT?

MR. DICKERSON: EXACTLY WHAT I WAS GETTING TO, YOUR HONOR.

WHEN DEALING WITH – WHEN LOOKING AT A GENERAL STATUTE VERSUS A SPECIFIC STATUTE, THE SUPREME COURT HAS STATED SPECIFICALLY, AS RECENTLY AS 1989 THAT I KNOW OF, THAT THE ONLY EXCEPTION TO THAT IS IF THE GENERAL STATUTE SPECIFICALLY OVERRULES. BY THAT, THE SUPREME COURT MEANT THAT THERE WAS CLEAR

UNEQUIVOCAL LANGUAGE TO OVERRULE THE SPECIFIC STATUTE.

THE COURT: YOU'RE SAYING –

MR. DICKERSON: I'M SAYING SECTION 9 IS NOT

THE COURT: HOLD ON. HOLD ON.

MR. DICKERSON: OKAY.

THE COURT: YOU'RE SAYING WE HAVE A SPECIFIC SECTION 2.

MR. DICKERSON: EXACTLY.

THE COURT: WHICH LIMITS THESE REMEDIES OR THE ENFORCEMENT OF THESE PROPERTY RIGHTS.

MR. DICKERSON: YES, YOUR HONOR.

THE COURT: AND THE GENERAL LANGUAGE OF SECTION 9 SHOULD NOT BE CONSTRUED AS TAKING AWAY OR CHANGING THE LIMITATIONS OF SECTION 2. IS THAT WHAT YOU'RE SAYING?

MR. DICKERSON: NO, NOT EXACTLY, YOUR HONOR.

THE COURT: WELL, THEN TELL IT TO ME.

MR. DICKERSON: ALL RIGHT. WE HAVE A GENERAL STATUTE OF THE BANKRUPTCY CODE PROVISIONS, THE ANTIFORFEITURE PROVISIONS. ALSO, WE HAVE A SPECIFIC STATUTE FROM THE NEGOTIATED RATES ACT, SECTION 2, THAT PROVIDES FOR A LIMITATION ON THE TRUSTEE'S RECOVERY.

THE SUPREME COURT SAID IF YOU ARE GOING TO HAVE THE GENERAL STATUTE OVERRULE THE SPECIFIC STATUTE, THERE MUST BE AN UNEQUIVOCAL EXCEPTION CREATED.

WHAT I'M SAYING IS, THE TRUSTEE IS MAKING ARGUMENT THAT SECTION 9 CONSTITUTES A STATEMENT THAT WE'RE NOT GOING TO HAVE THE SPECIFIC STATUTE CONTROL HERE. INSTEAD, THE GENERAL STATUTES APPLICATION WOULD CONTROL.

I'M SAYING THAT IT DOES NOT MEET THE SUPREME COURT OF BEING AN UNEQUIVOCAL STATUTE WORTHY OF OVERRULING THE-SPECIFIC STATUTE.

THE COURT: ALL RIGHT. I THINK I'M GOING TO TAKE ANOTHER FIVE-MINUTE RECESS. PLEASE DO NOT WANDER AWAY. I WANT TO FINISH BY NOON. AS A MATTER OF FACT, ONE OF MY COLLEAGUES, SOME OF THE COURT IS HAVING A BIRTHDAY CELEBRATION FOR HIM. FIVE MINUTES, AND THEN I WANT TO HEAR FROM I.C.C.

(RECESS TAKEN FROM 11:25 A.M. TO 11:35 A.M.)

THE COURT: MS. COOK, WE'LL HEAR FROM YOU, I GUESS, ON AGREEMENT OF I.C.C. AND THE GOVERNMENT TOGETHER.

HOW MUCH TIME DO YOU THINK YOU WILL NEED?

MS. COOK: I'LL NEED 10 MINUTES, YOUR HONOR.

THE COURT: ALL RIGHT. YOU WILL HAVE IT. GO AHEAD.

MS. COOK: THE FIRST POINT I'D LIKE TO MAKE PERTAINS TO THE FINANCIAL CONDITION ARGUMENT.

THE COURT: YOU WON'T SIT DOWN WITHOUT TALKING ABOUT SECTION 9.

MS. COOK: NO, I WILL NOT, YOUR HONOR.

THE COURT: ALL RIGHT. GO AHEAD.

MS. COOK: WOULD YOU PREFER ME TO ADDRESS THAT FIRST?

THE COURT: NO, GO AHEAD. YOU DO IT IN YOUR ORDER.

MS. COOK: THE FIRST POINT I WANT TO MAKE IS THAT THERE IS NO BASIS FOR RELYING ON THE AFFIDAVIT OF A CERTIFIED PUBLIC ACCOUNTANT TO OPINE WHAT CONGRESSIONAL INTENT WAS. SO EVEN THOUGH THAT AFFIDAVIT IS PART OF THE RECORD, IT HAS NO BEARING ON THE LEGAL QUESTION OF WHAT THE N.R.A. STANDS FOR AND WHAT THE N.R.A. MEANS.

THE COURT: I THINK IT'S SELF-EVIDENT THAT THE COURT AS A MATTER OF LAW MUST INTERPRET THOSE STATUTORY WORDS.

GO AHEAD.

MS. COOK: THE SECOND POINT ABOUT FINANCIAL CONDITION, YOUR HONOR, IS THAT THE TERM IN THE N.R.A. THAT THE CARRIER IS NO LONGER

TRANSPORTING PROPERTY IS BASED ON THE RATIONALE THAT MARKET FORCES WILL DISCIPLINE CARRIERS THAT ARE TRANSPORTING PROPERTY WHERE MARKET FORCES ARE NOT THERE TO DISCIPLINE CARRIERS THAT ARE NOT TRANSPORTING PROPERTIES.

THE COURT: DISCIPLINING THEM TO DO WHAT?

MS. COOK: TO NOT MAKE UNWARRANTED UNDERCHARGE CLAIMS AGAINST SHIPPERS.

IF A CARRIER IS TRANSPORTING PROPERTY, IT HAS AN ONGOING BUSINESS RELATIONSHIP WITH VARIOUS SHIPPERS AND IT WILL NOT WANT TO JEOPARDIZE THOSE BUSINESS RELATIONSHIPS BY MAKING UNJUSTIFIED UNDERCHARGE CLAIMS. ONCE THE COMPANY STOPS TRANSPORTING PROPERTY, IT HAS NO MARKET INCENTIVE NOT TO GO AFTER UNDERCHARGE CLAIMS.

THE COURT: IS THIS WHAT YOU'RE SAYING, THAT THERE IS NO PROBLEM THAT CONGRESS WANTED TO ADDRESS WHEN YOU LOOK AT COMPANIES STILL IN BUSINESS, BECAUSE THEIR DESIRE TO PROTECT SHIPPERS AGAINST BIG CLAIMS FOR PAST SERVICES IS NOT GOING TO BE NECESSARY. IF THE COMPANY IS STILL IN BUSINESS, IT HAS TO DEAL WITH ITS CUSTOMERS AND THEY JUST WON'T FILE LAWSUITS. IS THAT WHAT THE THINKING IS?

MS. COOK: YES, YOUR HONOR. THAT'S EXACTLY IT.

AND THAT'S WHY THE DISTINCTION IS COMPANIES THAT ARE TRANSPORTING PROPERTY VERSUS COMPANIES THAT ARE NOT LONG TRANSPORTING PROPERTY.

THE COURT: WHAT YOU'RE REALLY ARGUING IS THE RATIONAL BASIS FOR THE DISTINCTION CONGRESS HAS MADE, WHICH IS PROBABLY NOT TOTALLY GERMANE TO MY CASE TODAY. THERE IS NO CONSTITUTIONAL ISSUE.

BUT YOU'RE EXPLAINING TO ME, SORT OF BY COMING AROUND TO THE SIDE DOOR, THAT THIS IS NOT A STATUTE CONDITIONED UPON THE FINANCIAL CONDITION –

MS. COOK: THAT'S CORRECT, YOUR HONOR.

THE COURT: – OF THE COMPANY,

OKAY. GO AHEAD.

MS. COOK: MOVING ON TO THE SECTION 9. WHAT THE TRUSTEE OVERLOOKS IN HIS ARGUMENT IS THAT SECTION 9 DOES NOT JUST PERTAIN TO BANKRUPTCY CODE. IT ALSO SAYS THAT THE N.R.A. IS NOT INTENDED TO AFFECT THE APPLICABLE OF TITLE 28 AND NOT INTENDED TO AFFECT THE APPLICABILITY OF E.R.I.S.A.

THERE WAS AN EARLIER VERSION OF ANOTHER BILL THAT DID NOT TURN INTO THE N.R.A. IT WAS A BILL SPONSORED BY REPRESENTATIVE RAPINSKI, NO. 2021.

THAT BILL SPECIFICALLY AMENDED THE BANKRUPTCY CODE TO CHANGE THE PRIORITIES SO

THAT WORKERS FROM FORMER CARRIERS WOULD BE ABLE TO GET A HIGHER PRIORITY FOR THEIR WAGE CLAIMS. IT ALSO SPECIFICALLY AMENDED E.R.I.S.A.

SO SECTION 9 WAS ADDED TO CLARIFY THAT THE BILL THAT LATER BECAME THE N.R.A. DID NOT CONTAIN ANY PROVISIONS THAT SPECIFICALLY AMENDED THE BANKRUPTCY CODE OR SPECIFICALLY AMENDED E.R.I.S.A.

AND AS FAR AS THE REFERENCE TO TITLE 28, THERE WAS MUCH DEBATE IN THE CONGRESS ABOUT WHETHER THE N.R.A. WOULD CHANGE THE WAY THAT THE COURTS AND THE I.C.C. CONSIDERED THESE ISSUES. WHETHER THE ISSUES THAT ARISE WOULD BE REFERRED TO THE I.C.C., OR WHETHER THEY WOULD BE HANDLED BY THE COURTS.

AND THERE ARE SPECIFIC STATEMENTS MADE IN THE HOUSE ABOUT THIS DISPUTE. ONE OF THEM WAS CONGRESSMAN BROOKS, WHO THE TRUSTEE RELIES UPON IN AS CHAIRMAN OF THE JUDICIARY COMMITTEE.

AND CONGRESSMAN BROOKS EXPLAINED SECTION 9 AS SAYING THAT THE CURRENT PROCEDURE PERMITS THE FEDERAL COURTS TO ASSURE THE TIMELY AND FAIR ADMINISTRATION AND ADJUDICATION OF BANKRUPTCY CASES.

PURSUANT TO THE CHANGED LANGUAGE OF SECTION 9 OF THE ACT FROM THE LANGUAGE REPORTED FROM THE PUBLIC WORKS STUDY –

THE COURT: YOU'RE A LITTLE FAST. OUR REPORTER IS HAVING SOME TROUBLE.

MS. COOK: I'M SORRY.

THE COURT: SLOW DOWN A BIT.

PURSUANT TO – START AGAIN.

MS. COOK: PURSUANT TO CHANGED LANGUAGE OF SECTION 9 OF THE ACT FROM THE LANGUAGE REPORTED FROM THE PUBLIC WORKS COMMITTEE, THE FEDERAL COURTS, INCLUDING THE BANKRUPTCY COURTS, WILL CONTINUE TO HAVE JURISDICTION TO MAKE DETERMINATIONS IN CONNECTION WITH MOTOR CARRIER UNDERCHARGE CLAIMS AND RELATED ISSUES WHERE THE MOTOR CARRIER HAS SOUGHT THE PROTECTION OF THE BANKRUPTCY CODE.

AS A RESULT OF THIS PROVISION, IN THE EVENT OF A BANKRUPTCY FILING, REFERENCED IN THE ACT TO RESOLUTION BY, DETERMINATIONS BY AND REVIEW AND APPROVAL BY THE COMMISSION SHALL BE SUBJECT TO THE ORIGINAL JURISDICTION OF THE FEDERAL COURTS PURSUANT TO –

THE COURT: WELL, YOU SEEM TO BE SAYING THAT SECTION 9 IS PRINCIPALLY TALKING ABOUT JURISDICTION OF THE VARIOUS COURTS; RIGHT?

MS. COOK: YES, YOUR HONOR.

THE COURT: BUT THEY USED LANGUAGE WHICH IS SUSCEPTIBLE OF A WIDER OR A DIFFERENT MEANING, TO WIT, NOTHING IN THE ACT SHALL BE CONSTRUED AS LIMITING OR OTHERWISE

AFFECTING APPLICATION OF TITLE 11, UNITED STATES CODE, BUT YOU WANT ME TO READ THAT IN TERMS OF RESERVING EVERY ENTITY'S JURISDICTION. THAT'S REALLY WHAT YOU'RE SAYING THAT MEANS.

MS. COOK: YES, YOUR HONOR.

AND THERE ARE OTHER STATEMENTS AS WELL THAT SUPPORT THAT READING. ONE IS FROM REPRESENTATIVE SCHUSTER. ON THE HOUSE FLOOR HE SAID THAT SECTION 9 CLARIFIES THE COMMITTEE'S INTENTION THAT THE N.R.A. DOES NOT AFFECT THE JURISDICTION OF THE COURTS OF THE UNITED STATES, INCLUDING BANKRUPTCY COURTS, TO DETERMINE ANY MATTER REGARDING A BANKRUPT CARRIER OTHER THAN DETERMINATIONS STATUTORILY ACQUIRED BY THE N.R.A. TO BE RESOLVED BY THE I.C.C.

THE COURT: I THINK I SHOULD NOTE HERE THAT COUNSEL FOR PLAINTIFFS ARGUMENT ABOUT SECTION 9 AFFECTS ONLY MY ALTERNATIVE GROUND OF DECISION ANYWAY, BUT I AM NOW PREPARED TO REAFFIRM THAT I DO NOT AGREE WITH HIM THAT SECTION 9 IS IN ANY WAY A LIMITING OR INHIBITING FACTOR IN TERMS OF THE MEANING AND APPLICATION OF SECTION 2 FOR THE PURPOSES OF OUR CASE.

SO I KNOW YOU HAVE COME A LONG WAY. IS THERE ANYTHING ELSE YOU WANT TO SAY. I'M ABOUT READY TO ADOPT A TENTATIVE RESULT.

MS. COOK: NO, YOUR HONOR. THAT CONCLUDES MY ARGUMENT.

THE COURT: VERY WELL.

THE COURT DOES ADOPT THE TENTATIVE RESULT. THE MOTION OF THE DEFENDANT IS GRANTED. THE MOTION OF THE GOVERNMENT – EXCUSE ME – OF THE PLAINTIFF, THE TRUSTEE IS DENIED, THE COURT'S FINDING IS THAT THERE IS NO BONA FIDE DISPUTE OF MATERIAL FACT AND DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THE PLAINTIFF TRUSTEE IS NOT.

THERE ARE SOME ISSUES THAT WE OUGHT TO TAKE UP BETWEEN US. I WILL DO MY OWN ORDER, BUT I WOULD LIKE THOSE AT DEFENSE TABLE HERE TO ORDER A TRANSCRIPT. I WILL INCORPORATE IT BY REFERENCE.

WILL YOU DO THAT, PLEASE?

MR. DICKERSON: YES, YOUR HONOR.

THE COURT: LET ME FIND MY NOTATION OF THE OTHER MATTERS THAT NEED DISCUSSION. HOLD ON A SECOND, PLEASE. I HAVE SOME PAPERS OUT OF ORDER HERE. OH, YES.

THE JUDGMENT THAT I AM GOING TO PREPARE, I DON'T BELIEVE WILL CONTAIN ALL THE FINDINGS THAT ARE IN DEFENDANT'S PROPOSED JUDGMENT BECAUSE IT'S NOT NECESSARY ON THIS FINDING OF UNSTIPULATED FACTS. WE WANT TO DISCUSS THE COUNTERCLAIM.

WITH THIS JUDGMENT, I TAKE IT THE DEFENSE WOULD NOT BE PURSUING THE COUNTERCLAIM.

CAN I ASSUME THAT YOU HAVE CONDITIONALLY DISMISSED THE COUNTERCLAIM?

MR. DICKERSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND IF THIS JUDGMENT IS FINALLY AFFIRMED, THE DISMISSAL WILL GOVERN?

MR. DICKERSON: YES, SIR.

THE COURT: THERE WILL BE NO NEED TO TRY THE COUNTERCLAIM. IF THE JUDGMENT IS REVERSED AND THE MATTER IS AGAIN IN THIS COURT, THE COUNTERCLAIM WOULD BE OPEN FOR YOU TO PURSUE.

MR. DICKERSON: I THINK THAT'S RIGHT. IF I MAY SUGGEST, YOUR HONOR, I SUGGEST THAT THE COUNTERCLAIM BE DEEMED MOOT INASMUCH AS –

THE COURT: I'LL THINK ABOUT THAT. MAYBE THAT'S THE WAY TO HANDLE IT, BUT YOU CERTAINLY ARE NOT GOING TO PURSUE THE COUNTERCLAIM AS LONG AS THE JUDGMENT IS IN EFFECT.

MR. DICKERSON: THAT IS CORRECT.

THE COURT: OKAY. NOW WE WANT TO DISCUSS ALSO WHAT SHOULD BE DONE – AND I GUESS WE'LL DISCUSS IT WITH ANY INTERESTED COUNSEL WHO IS HERE – WITH THREE OTHER CASES, HERE THEY ARE. ONE OF THEM IS AS *GUMPORT* VERSUS *BECKLEY CARDY*, A PART OF BOISE CASCADE.

THAT'S IN MY COURT NOW. IN OUR COURT AS CV 93-7812.

MR. GUMPORT, WHAT IS YOUR THINKING ABOUT THAT CASE? I WOULD THINK YOU ARE CLEARLY BOUND BY COLLATERAL ESTOPPEL. DO YOU HAVE ANY THOUGHTS ABOUT WHAT TO DO WITH THAT CASE?

MR. GUMPORT: YOUR HONOR, MAY I HAVE MR. STEINFELD ADDRESS YOU ON THAT JUST BECAUSE HE IS THE PRINCIPAL ATTORNEY ON THAT MATTER.

THE COURT: SURE.

MR. GUMPORT: THANK YOU.

THE COURT: WHAT DISPOSITION DO YOU SUGGEST?

MR. STEINFELD: YOUR HONOR, I WOULD THINK THAT CASE SHOULD CONTINUE. AT THIS POINT, BOISE CASCADE, TO MY KNOWLEDGE, IS NOT A SMALL BUSINESS CONCERN. THEY HAVE NOT RAISED THAT THEY ARE AND THEY SOUGHT DISMISSAL ON THAT BASIS.

THE COURT: WELL, YOU WOULD NOT EXPECT ME TOO READJUDICATE THE APPLICATION OF SECTION 2 IN THE CASE, WOULD YOU?

MR. STEINFELD: NO, I WOULD NOT, YOUR HONOR.

IF WE DECIDE TO, CERTAINLY, BOISE, CASCADE HAS A RIGHT TO SETTLE AT 20 PERCENT OF THE UNDERCHARGED CLAIM.

NOW, THEY MAY NOT ELECT THAT REMEDY, THE ACTIVES AND THE OPTION. THEY HAVE BEEN NOTIFIED OF THE N.R.A. WE HAVE DONE THAT ALREADY.

THE COURT: IS ANYBODY HERE FROM THERE TODAY TO YOUR KNOWLEDGE, ANY OF COUNSEL IN THAT CASE?

MR. STEINFELD: I DO NOT SEE THEM IN THE COURTROOM, YOUR HONOR.

SO I WOULD THINK THAT CASE WOULD HAVE TO CONTINUE. WE ARE COLLATERALLY ESTOPPED FROM DENYING –

THE COURT: DO THIS, WOULD YOU PLEASE. I WILL MAKE NOTE. OBVIOUSLY, THERE IS NO DISPOSITION OF THAT CASE TODAY. IT'S NOT ON MY CALENDAR. CHECK WITH COUNSEL. SEE IF THERE IS A JOINT AGREEMENT AS TO WHAT SHOULD BE DONE WITH IT. IF SO, PUT IT IN THE FORM OF A STIPULATION. IF NOT, TELL THE CLERK AND WE'LL SET IT FOR A STATUS CONFERENCE AND WE'LL TALK ABOUT THAT WITH COUNSEL FOR BOTH SIDES. OKAY?

MR. STEINFELD: THAT'S FAIR ENOUGH, YOUR HONOR. I SHALL.

THE COURT: AND WE'LL DO IT QUICKLY.

CASES TWO AND THREE ON MY LIST ARE BANKRUPTCY APPEALS. ONE OF THEM IS CALLED *GUMPORT* VERSUS *CREST* AND ONE IS CALLED *GUMPORT* VERSUS *BIOCLINIC*. THESE CASES ARE BEING

APPEALED ON THE GROUND THAT IMPROPER SERVICE WAS NOT MADE WHEN THE COMPLAINTS WERE SERVED IN THE BANKRUPTCY COURT.

ARE COUNSEL HERE REPRESENTING EITHER OF THOSE DEFENDANTS?

MR. DICKERSON: YES, YOUR HONOR.

THE COURT: THAT'S YOU; ISN'T IT, IN ONE OF THEM?

MR. DICKERSON: I'M SORRY, YOUR HONOR. ACTUALLY, IT WILL BE ON BOTH OF THEM.

THE COURT: OKAY. OH, OKAY.

THOSE FILES, MR. BUTLER TRANSFERRED THOSE FILES TO ME AT THE END OF LAST WEEK AND I HAVE NOT EVEN HAD A CHANCE TO REVIEW THEM.

THE COURT: WELL, YOU KNOW WHAT STATE THEY ARE IN, THOUGH. THESE ARE APPEALS FROM THE SERVICE SITUATION. LET'S SEE IF THE PLAINTIFF HAS SOME IDEA ABOUT WHAT TO DO WITH THOSE.

MR. STEINFELD: OKAY. YOUR HONOR, AGAIN, THERE IS ONLY A SINGLE ISSUE FOR THE COURT IS WHETHER OR NOT TO GRANT THE INTERLOCUTORY APPEAL. THAT HAS NOT BEEN RULED UPON YET.

THE COURT: YES, I KNOW. THERE IS A QUESTION OF AN INTERLOCUTORY APPEAL IN HERE.

CHECK ME, IS THAT CALENDARED?

MR. STEINFELD: I HAVE NOT SEEN ANYTHING CALENDARED YET.

THE COURT: THE CLERK INDICATES THAT IT ISN'T EITHER.

GO AHEAD.

MR. STEINFELD: ONE POSSIBLE APPROACH WOULD BE FOR THE COURT TO INITIALLY DECIDE WHETHER OR NOT IT WISHES TO HEAR THAT APPEAL ON THE INTERLOCUTORY BASIS. IF IT DOES NOT AND REMANDS THE CASE BACK TO THE BANKRUPTCY COURT, WE WILL OF COURSE BE BOUND BY THE COURT'S RULING HERE REGARDING THE N.R.A.

IF *CREST* OR *BIOCLINIC* IS A SMALL BUSINESS CONCERN, WE WOULD OBVIOUSLY BE FACING A DISMISSAL IN THE BANKRUPTCY COURT. AND THEREFORE, WE WOULD RESERVE OUR RIGHTS, I ASSUME, BUT WE WOULD BE SUBJECT TO THIS COURT'S RULING.

THE COURT: IN A SENSE, THAT WOULD MAKE THE DISPUTE OVER SERVICE MOOT.

MR. STEINFELD: IT WOULD. AND I HAVE NO KNOWLEDGE OF WHETHER OR NOT *BIOCLINIC* OR *CREST* IS A SMALL BUSINESS CONCERN. ALTERNATIVELY, IT MAY BE IF THEY ARE NOT, THEY WISH TO SETTLE AT THE N.R.A. PERCENTAGES, AGAIN, MAKING THE CASE MOOT.

THE COURT: WELL, LET ME TELL YOU THIS:

I AM CLEAR THAT THIS IS AN INTERLOCUTORY APPEAL AT LEAST THAT'S MY VIEW NOW WITHOUT HAVING LOOKED THOROUGHLY AT ALL THE PAPERS AND ALL THE AUTHORITIES.

THE BANKRUPTCY COURT HAS ALREADY HEARD THAT THE SERVICE IS PROPER, HAS ALREADY HELD THAT, AND WOULD GO FORWARD WITH THE CASE. BUT I WOULD EXPECT THAT THE CASE WOULD HAVE TO BE GOVERNED BY THE LAW AS DECLARED HERE TODAY ON THE EFFECT OF N.R.A.

MR. DICKERSON: YOUR HONOR, IF I MAY.

THE COURT: MAYBE COUNSEL FOR DEFENDANTS WILL STIPULATE NOW THAT THE SERVICE WAS PROPER.

MR. DICKERSON: I DON'T BELIEVE SO, YOUR HONOR. I AM IN CONTACT WITH MY CO-COUNSEL, MR. RICHARD STREETER, OF WASHINGTON, D.C. IT IS MY UNDERSTANDING THAT HE WISHES TO PRESS THE APPEAL OF THE IMPROPER SERVICE. THAT IS MY UNDERSTANDING AT THIS TIME, ALTHOUGH I HAVE NOT HAD A CHANCE TO SPEAK WITH HIM IN LIGHT OF TODAY'S DEVELOPMENTS, CERTAINLY. I WOULD LIKE TO HAVE THE OPPORTUNITY TO DO THAT.

THE COURT: WELL, LET'S DO THE SAME THING THEN.

WILL YOU PLEASE THINK ABOUT IT NOW IN THE LIGHT OF TODAY'S JUDGMENT AND SEE IF YOU CAN AGREE ON WHAT FUTURE, INCLUDING A POSSIBLE STAY OR SOMETHING. I HAVE NO IDEA WHAT SHOULD BE DONE WITH THE CASE, BUT I NOW HAVE THIS PENDING APPEAL ON THE SERVICE ISSUE. SEE IF YOU FOLKS CAN COME TO SOME

AGREEMENT ON WHAT SHOULD BE DONE WITH THOSE APPEALS.

MR. DICKERSON: YES, SIR.

THE COURT: PUT IT IN A STIPULATION, IF YOU CAN REACH ONE. IF YOU CAN'T, TELL THE CLERK PROMPTLY AND WE'LL DO SOMETHING ABOUT IT.

MR. DICKERSON: THANK YOU, YOUR HONOR.

THE COURT: NOW, IN CASE THERE IS ANYBODY IN THE COURTROOM WHO REPRESENTS A DEFENDANT IN ONE OF THESE CASES IN THE BANKRUPTCY COURT AND IS THINKING ABOUT TRYING TO GET THE REFERENCE WITHDRAWN SO THEIR CASE CAN BE HERE, WHICH PROCEDURE IF SUCCESSFUL WOULD PUT ON MY DOORSTEP EVERY ONE OF THESE THOUSANDS OF CASES. AND AS FAR AS I CAN SEE, WOULD INVOLVE EXACTLY THE SAME PROBLEM I HAVE ADJUDICATED TODAY. I WOULD ASK YOU TO THINK LONG AND HARD BEFORE YOU TRY TO GET THE REFERENCE WITHDRAWN.

I'M GOING TO TALK TO MY COLLEAGUES WHO ARE THE BANKRUPTCY DUTY JUDGES AND ASK THEM TO CONSIDER NOT ENTERTAINING ANY REQUESTS FOR THAT TYPE OF RELIEF.

WELL, I WOULD SAY THIS, IN THAT GENERAL CONNECTION ALSO.

BOTH SIDES AND THE GOVERNMENT HAVE GOTTEN THE QUICK ADJUDICATION THAT YOU WANTED. I'M SURE YOU'RE ALL RARING TO GO UP TO THE NEXT LEVEL, AND THAT'S FINE WITH ME.

BUT I WANT AND EXPECT A MAXIMUM COOPERATION FROM EVERYBODY IN NOT HAVING THIS WHOLE VAST THOUSANDS OF CASES FOUND ON MY DOORSTEP LIKE UNWANTED NEW INFANTS ON THE CHURCH STEPS.

ANYWAY, I HAVE NOTHING FURTHER TO SAY TO ALL OF YOU EXCEPT THIS: I AM IN YOUR DEBT, AND THAT'S EVERYBODY WHO HAS SUBMITTED PAPERS IN THIS CASE. I AM IN YOUR DEBT FOR FINE PAPERS, EXCELLENT ONES ALL THE WAY THROUGH. AND I THANK YOU.

COURT IS ADJOURNED.

(PROCEEDING CONCLUDED AT 11:50 A.M.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPTION PROM THE STENOGRAPHIC RECORD OF THESE PROCEEDINGS.

_____

SUSAN E. MALOUF
OFFICIAL COURT
REPORTER

DATED: ___

APPENDIX D

SUMMARY JUDGMENT FOR DEFENDANT; DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

APPENDIX D

[Filed March 28, 1995]
[Entered March 29, 1995]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re: TRANSCON LINES, Debtor.	NO. CV94-1248-IH Adv. No. SB 93-2917-DN Bankr. No. SB 93-22207-DN [Reference Withdrawn]
LEONARD L. GUMPORT, Trustee etc., Plaintiff, v. STERLING PRESS, Defendant.	SUMMARY JUDGMENT FOR DEFENDANT; DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

There came before the Court for hearing on March 22, 1994, mutual summary judgment motions. Plaintiff's partial summary judgment motion was filed under date of March 2, 1994; defendant's motion for total summary judgment was made orally in open Court. Defendants lodged a proposed judgment under date of March 3, 1994.

Appearances were: For plaintiff, Leonard L. Gumport, Esq. (argued) and Sims, Walker & Steinfeld by Joseph L. Steinfeld, Esq. For defendant Sterling Press, Mark A. Dickerson, Esq. (argued); and for amici United States of America and Interstate Commerce Commission, Beth E. Cook, Esq. (argued) and Henri Rush, Esq. Numerous

appearances were also recorded for other amici and interested parties.

The Court, having considered the said motions, together with the evidence, points and authorities and other documents filed in support thereof and in opposition thereto, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff's motion for partial summary judgment is denied, and defendant's motion for total summary judgment is granted. The Court finds that there is no bona fide dispute of material fact and that defendant has shown entitlement to judgment as a matter of law.

2. The Court holds that Section 2 of the Negotiated Rates Act of 1993 applies to the instant case and the defenses provided herein are available to the defendant in the instant case.

3. Defendant Sterling Press shall have judgment against plaintiff Leonard L. Gumport, Trustee, with costs of $___. Plaintiff Leonard L. Gumport, Trustee shall take nothing by his action.

4. A transcript of the proceedings in open court on March 22, 1994 is ordered filed when produced. It is incorporated herein by reference. Said transcript shall constitute the Court's findings of fact and conclusions of law as well as a statement of the Court's reasons.

5. The Clerk shall transmit a copy of this judgment by U.S. Mail to Bankruptcy Judge Naugle and all counsel of record.

DATED: March 28, 1994.

/s/
IRVING HILL, Judge
United States District Court

APPENDIX E
STATUTORY PROVISIONS

APPENDIX E

STATUTES

TITLE 11

SECTION 102 (11 U.S.C. § 102)

§ 102. Rules of construction.

In this title –

* * *

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive . . . .

SECTION 363 (11 U.S.C. § 363)

§ 363. Use, sale, or lease of property.

* * *

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * *

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of

business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

* * *

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

* * *

SECTION 365 (11 U.S.C. § 365)

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

* * *

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

* * *

SECTION 507 (11 U.S.C. § 507)

§ 507. Priorities.

(a) The following expenses and claims have priority in the following order:

* * *

(3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan. . . .

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) As beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution; or,

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(B) but for the operation of this paragraph, the estate could include such interest only by virtue of section 365 or 544(a)(3) of this title.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an

agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

SECTION 545 (11 U.S.C. § 545)

§ 545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien –

(1) first becomes effective against the debtor –

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists;

(3) is for rent; or

(4) is a lien of distress for rent.

SECTION 1142 (11 U.S.C. § 1142)

§ 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

DISTRICT COURTS: JURISDICTION (CHAPTER 85)

28 U.S.C. § 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * *

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

TITLE 29

LABOR

SECTION 1001(a) (29 U.S.C. § 1001(a))

§ 1001(a). Additional Congressional findings and declaration of policy

The Congress finds that the growth in size, scope, and number of employee benefit plans in recent years has been rapid and substantial; . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with the national public interest . . . .

SECTION 1382 (29 U.S.C. § 1382)

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

* * *

SECTION 1383 (29 U.S.C. § 1383)

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

* * *

TITLE 49

TRANSPORTATION

SECTION 10102 (49 U.S.C. § 10102)

§ 10102. Definitions

In this subtitle –

* * *

(13) "motor carrier" means a motor common carrier and a motor contract carrier.

(14) "motor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.

(15) "motor contract carrier" means –

(A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation

under continuing agreements with a person or a limited number of persons –

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person; and

(B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons –

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person.

PUBLIC LAW 103-180 [S. 412]; December 3, 1993

NEGOTIATED RATES ACT OF 1993

For Legislative History of Act, see Report for P.L. 103-180 in U.S.C.C.A.N. Legislative History Section.

An Act to amend title 49, United States Code, relating to procedures for resolving claims involving unfiled, negotiated transportation rates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Negotiated Rates Act of 1993".

SEC. 2. PROCEDURES FOR RESOLVING CLAIMS INVOLVING UNFILED, NEGOTIATED TRANSPORTATION RATES.

(a) IN GENERAL. – Section 10701 of title 49, United States Code, is amended by adding at the end the following:

"(f) PROCEDURES FOR RESOLVING CLAIMS INVOLVING UNFILED, NEGOTIATED TRANSPORTATION RATES. –

"(1) IN GENERAL. – When a claim is made by a motor carrier of property (other than a household goods carrier) providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, by a freight forwarder (other than a household goods freight forwarder), or by a party representing such a carrier or freight forwarder regarding the collection of rates or charges for such transportation in addition to those originally billed and collected by the carrier or freight forwarder for such transportation, the person against whom the claim is made may elect to satisfy the claim under the provisions of paragraph (2), (3), or (4) of this subsection, upon showing that –

"(A) the carrier or freight forwarder is no longer transporting property or is transporting property for the purpose of avoiding the application of this subsection; and

"(B) with respect to the claim –

"(i) the person was offered a transportation rate by the carrier or freight forwarder other than that legally on file with the Commission for the transportation service;

"(ii) the person tendered freight to the carrier or freight forwarder in reasonable reliance upon the offered transportation rate;

"(iii) the carrier or freight forwarder did not properly or timely file with the Commission a tariff providing for such transportation rate or failed to enter into an agreement for contract carriage;

"(iv) such transportation rate was billed and collected by the carrier or freight forwarder; and

"(v) the carrier or freight forwarder demands additional payment of a higher rate filed in a tariff.

If there is a dispute as to the showing under subparagraph (A), such dispute shall be resolved by the court in which the claim is brought. If there is a dispute as to the showing under subparagraph (B), such dispute shall be resolved by the Commission. Pending the resolution of any such dispute, the person shall not have to pay any additional compensation to the carrier or freight forwarder. Satisfaction of the claim under paragraph (2), (3), or (4) of this subsection shall be binding on the parties, and the parties shall not be subject to chapter 119 of this title.

"(2) CLAIMS INVOLVING SHIPMENTS WEIGHING 10,000 POUNDS OR LESS. – A person from whom the additional legally applicable and effective tariff rate or charges are sought may elect to satisfy the claim if the shipments each weighed 10,000 pounds or less, by payment of 20 percent of the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid. In the event that a dispute arises as to the rate that was legally applicable to the shipment, such dispute shall be resolved by the Commission.

"(3) CLAIMS INVOLVING SHIPMENTS WEIGHING MORE THAN 10,000 POUNDS. – A person from whom the additional legally applicable and effective tariff rate or charges are sought may elect to satisfy the claim if the shipments each weighed more than 10,000 pounds, by payment of 15 percent of the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid. In the event that a dispute arises as to the rate that was legally applicable to the shipment, such dispute shall be resolved by the Commission.

"(4) CLAIMS INVOLVING PUBLIC WAREHOUSEMEN. – Notwithstanding paragraphs (2) and (3), a person from whom the additional legally applicable and effective tariff rate or charges are sought may elect to satisfy the claim by payment of 5 percent of the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid if such person is a public warehouseman. In the event that a dispute arises as to the rate that was legally applicable to the shipment, such dispute shall be resolved by the Commission.

"(5) EFFECTS OF ELECTION. – When a person from whom additional legally applicable freight rates or charges are sought does not elect to use the provisions of paragraph (2), (3), or (4), the person may pursue all rights and remedies existing under this title.

"(6) STAY OF ADDITIONAL COMPENSATION. – When a person proceeds under this section to challenge the reasonableness of the legally applicable freight rate or charges being claimed by a carrier or freight forwarder described in paragraph (1) in addition to those already billed and collected, the person shall not have to pay any additional compensation to the carrier or freight forwarder until the Commission has made a determination as to the reasonableness of the challenged rate as applied to the freight of the person against whom the claim is made.

"(7) LIMITATION ON STATUTORY CONSTRUCTION. – Except as authorized in paragraphs (2), (3), (4), and (9) of this subsection, nothing in this subsection shall relieve a motor common carrier, of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762 of this title.

"(8) NOTIFICATION OF ELECTION. –

"(A) GENERAL RULE. – A person must notify the carrier or freight forwarder as to its election to proceed under paragraph (2), (3), or (4). Except as provided in subparagraphs (B), (C), and (D), such election may be made at any time.

"(B) DEMANDS FOR PAYMENT INITIALLY MADE AFTER DATE OF ENACTMENT. – If the carrier or freight forwarder or party representing

such carrier or freight forwarder initially demands the payment of additional freight charges after the date of the enactment of this subsection and notifies the person from whom additional freight charges are sought of the provisions of paragraphs (1) through (7) at the time of the making of such initial demand, the election must be made not later than the later of –

"(i) the 60th day following the filing of an answer to a suit for the collection of such additional legally applicable freight rate or charges, or

"(ii) the 90th day following the date of the enactment of this subsection.

"(C) PENDING SUITS FOR COLLECTION MADE BEFORE OR ON DATE OF ENACTMENT. – If the carrier or freight forwarder or party representing such carrier or freight forwarder has filed, before or on the date of the enactment of this subsection, a suit for the collection of additional freight charges and notifies the person from whom additional freight charges are sought of the provisions of paragraphs (1) through (7), the election must be made not later than the 90th day following the date on which such notification is received.

"(D) DEMANDS FOR PAYMENT MADE BEFORE OR ON DATE OF ENACTMENT. – If the carrier or freight forwarder or party representing such carrier or freight forwarder has demanded the payment of additional freight charges, and has not filed a suit for the collection of such additional freight charges, before or on the date of the enactment of this subsection

and notifies the person from whom additional freight charges are sought of the provisions of paragraphs (1) through (7), the election must be made not later than the later of –

"(i) the 60th day following the filing of an answer to a suit for the collection of such additional legally applicable freight rate or charges, or

"(ii) the 90th day following the date of the enactment of this subsection.

"(9) CLAIMS INVOLVING SMALL-BUSINESS CONCERNS, CHARITABLE ORGANIZATIONS, AND RECYCLABLE MATERIALS. – Notwithstanding paragraphs (2), (3), and (4), a person from whom the additional legally applicable and effective tariff rate or charges are sought shall not be liable for the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid –

"(A) if such person qualifies as a small-business concern under the Small Business Act (15 U.S.C. 631 et seq.),

"(B) if such person is an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, or

"(C) if the cargo involved in the claim is recyclable materials, as defined in section 10733.".

(b) CONFORMING AMENDMENT. – Subsection (e) of such section is amended by striking "In" and inserting "Except as provided in subsection (f), in".

(c) APPLICABILITY. – The amendments made by subsections (a) and (b) of this section shall apply to all claims pending as of the date of the enactment of this Act and to all claims arising from transportation shipments tendered on or before the last day of the 24-month period beginning on such date of enactment.

(d) REPORT. – Not later than 18 months after the date of the enactment of this Act, the Interstate Commerce Commission shall transmit to Congress a report regarding whether there exists a justification for extending the applicability of amendments made by subsections (a) and (b) of this section beyond the period specified in subsection (c).

(e) ALTERNATIVE PROCEDURE FOR RESOLVING DISPUTES.–

(1) GENERAL RULE. For purposes of section 10701 of title 49, United States Code, it shall be an unreasonable practice for a motor carrier of property (other than a household goods carrier) providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of such title, a freight forwarder (other than a household goods freight forwarder), or a party representing such a carrier or freight forwarder to attempt to charge or to charge for a transportation service provided before September 30, 1990, the difference between the applicable rate that is lawfully in effect pursuant to a tariff that is filed in accordance with chapter 107 of such title by the carrier or freight forwarder applicable to such transportation service and the negotiated rate for such transportation service if the carrier or freight forwarder is no longer transporting property between places described in section

10521(a)(1) of such title or is transporting property between places described in section 10521(a)(1) of such title for the purpose of avoiding the application of this subsection.

(2) JURISDICTION OF COMMISSION. – The Commission shall have jurisdiction to make a determination of whether or not attempting to charge or the charging of a rate by a motor carrier or freight forwarder or party representing a motor carrier or freight forwarder is an unreasonable practice under paragraph (1). If the Commission determines that attempting to charge or the charging of the rate is an unreasonable practice under paragraph (1), the carrier, freight forwarder, or party may not collect the difference described in paragraph (1) between the applicable rate and the negotiated rate for the transportation service. In making such determination, the Commission shall consider –

(A) whether the person was offered a transportation rate by the carrier or freight forwarder or party other than that legally on file with the Commission for the transportation service;

(B) whether the person tendered freight to the carrier or freight forwarder in reasonable reliance upon the offered transportation rate;

(C) whether the carrier or freight forwarder did not properly or timely file with the Commission a tariff providing for such transportation rate or failed to enter into an agreement for contract carriage;

(D) whether the transportation rate was billed and collected by the carrier or freight forwarder; and

(E) whether the carrier or freight forwarder or party demands additional payment of a higher rate filed in a tariff.

(3) STAY OF ADDITIONAL COMPENSATION. – When a person proceeds under this subsection to challenge the reasonableness of the practice of a motor carrier, freight forwarder, or party described in paragraph (1) to attempt to charge or to charge the difference described in paragraph (1) between the applicable rate and the negotiated rate for the transportation service in addition to those charges already billed and collected for the transportation service, the person shall not have to pay any additional compensation to the carrier, freight forwarder, or party until the Commission has made a determination as to the reasonableness of the practice as applied to the freight of the person against whom the claim is made.

(4) TREATMENT. – Paragraph (1) of this subsection is enacted as an exception, and shall be treated as an exception, to the requirements of sections 10761(a) and 10762 of title 49, United States Code, relating to a filed tariff rate for a transportation or service subject to the jurisdiction of the Commission and other general tariff requirements.

(5) NONAPPLICABILITY OF NEGOTIATED RATE DISPUTE RESOLUTION PROCEDURE. – If a person elects to seek enforcement of paragraph (1) with respect to a rate for a transportation or service, section 10701(f) of title 49, United States Code, as added

by subsection (a) of this section, shall not apply to such rate.

(6) DEFINITIONS. – For purposes of this subsection, the following definitions apply:

(A) COMMISSION, HOUSEHOLD GOODS, HOUSEHOLD GOODS FREIGHT FORWARDER, AND MOTOR CARRIER. – The terms "Commission," "household goods", "household goods freight forwarder", and "motor carrier" have the meaning such terms have under secton 10102 of title 49, United States Code.

(B) NEGOTIATED RATE. – The term "negotiated rate" means a rate, charge, classification, or rule agreed upon by a motor carrier or freight forwarder described in paragraph (1) and a shipper through negotiations pursuant to which no tariff was lawfully and timely filed with the Commission and for which there is written evidence of such agreement.

(f) PRIOR SETTLEMENTS AND ADJUDICATIONS. – Any claim that, but for this subsection, would be subject to any provision of this Act (including any amendment made by this Act) and that was settled by mutual agreement of the parties to such claim, or resolved by a final adjudication of a Federal or State court, before the date of the enactment of this Act shall be treated as binding, enforceable, and not contrary to law, unless such settlement was agreed to as a result of fraud or coercion.

(g) RATE REASONABLENESS. Section 10701(e) of title 49, United States Code, is amended by adding at the end of the following: "Any complaint brought against a motor carrier (other than a carrier described in subsection

(f)(1)(A)) by a person (other than a motor carrier) for unreasonably high rates for past or future transportation shall be determined under this subsection.".

SEC. 3. STATUTE OF LIMITATIONS

(a) MOTOR CARRIER CHARGES. – Section 11706(a) of title 49, United States Code, is amended by striking the period at the end and inserting the following: "; except that a motor carrier (other than a motor carrier providing transportation of household goods) or freight forwarder (other than a household goods freight forwarder) –

> "(1) must begin such a civil action within 2 years after the claim accrues if the transportation or service is provided by the carrier in the 1-year period beginning on the date of the enactment of the Negotiated Rates Act of 1993; and
>
> "(2) must begin such a civil action within 18 months after the claim accrues if the transportation or service is provided by the carrier after the last day of such 1-year period.".

(b) MOTOR CARRIER OVERCHARGES. – Section 11706(b) of title 49, United States Code, is amended by striking". If that claim is against a common carrier" and inserting the following: "; except that a person must begin a civil action to recover overcharges from a motor carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title for transportation or service –

> "(1) within 2 years after the claim accrues if such transportation or service is provided in the 1-year period beginning on the date of the

enactment of the Negotiated Rate Act of 1993; and

"(2) within 18 months after the claim accrues if such transportation or service is provided after the last day of such 1-year period.

If the claim is against a common carrier".

(c) CONFORMING AMENDMENT. – Section 11706(d) of title 49, United States Code, is amended –

(1) by striking "3-year period" each place it appears and inserting "limitation periods";

(2) by striking "is extended" the first place it appears and inserting "are extended"; and

(3) by striking "each".

SEC. 4. TARIFF RECONCILIATION RULES FOR MOTOR CARRIERS OF PROPERTY.

(a) IN GENERAL. – Chapter 117 of title 49, United States Code, is amended by adding at the end the following:

"§ 11712. Tariff reconciliation rules for motor common carriers of property

"(a) MUTUAL CONSENT. – Subject to Commission review and approval, motor carriers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title (other than motor carriers providing transportation of household goods) and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from incorrect tariff provisions or billing errors arising from the inadvertent failure to properly

and timely file and maintain agreed upon rates, rules, or classifications in compliance with sections 10761 and 10762 of this title. Resolution of such claims among the parties shall not subject any party to the penalties of chapter 119 of this title.

"(b) LIMITATION ON STATUTORY CONSTRUCTION. – Nothing in this section shall relieve the motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762, except as provided in subsection (a) of this section.

"(c) RULEMAKING PROCEEDING. – Not later than 90 days after the date of the enactment of this section, the Commission shall institute a proceeding to establish rules pursuant to which the tariff requirements of sections 10761 and 10762 of this title shall not apply under circumstances described in subsection (a) of this section.".

(b) CONFORMING AMENDMENT. – The analysis for chapter 117 of title 49, United States Code, is amended by adding at the end the following:

"11712. Tariff reconciliation rules for motor common carriers of property.".

SEC. 5. CUSTOMER ACCOUNT CODES AND RANGE TARIFFS.

(a) CUSTOMER ACCOUNT CODES. – Section 10762 of title 49, United States Code, is amended by adding at the end the following:

"(h) CUSTOMER ACCOUNT CODES. – No tariff filed by a motor carrier of property with the Commission before,

on, or after the date of the enactment of this subsection may be held invalid solely on the basis that a numerical or alpha account code is used in such tariff to designate customers or to describe the applicability of rates. For transportation performed on and after the 180th day following such date of enactment, the name of the customer for each account code must be set forth in the tariff (other than the tariff of a motor carrier providing transportation of household goods).".

"(b) RANGE TARIFFS. – Such section is further amended by adding at the end the following:

"(i) RANGE TARIFFS. – No tariff filed by a motor carrier of property with the Commission before, on, or after the date of the enactment of this subsection may be held invalid solely on the basis that the tariff does not show a specific rate or discount for a specific shipment if the tariff is based on a range of rates or discounts for specific classes of shipments. For transportation performed on or after the 180th day following such date of enactment, such a range tariff must identify the specific rate or discount from among the range of rates or discounts contained in such range tariff which is applicable to each specific shipment or must contain an objective means for determining the rate.".

SEC. 6. CONTRACTS OF MOTOR CONTRACT CARRIERS.

(a) IN GENERAL. – Section 10702 of title 49, United States Code , is amended by adding at the end the following new subsection:

"(c) CONTRACTS OF CARRIAGE FOR MOTOR CONTRACT CARRIERS. –

"(1) GENERAL RULE. – A motor contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title shall enter into a written agreement, separate from the bill of lading or receipt, for each contract for the provision of transportation subject to such jurisdiction which is entered into after the 90th day following the date of the enactment of this subsection.

"(2) MINIMUM CONTENT REQUIREMENTS. – The written agreement shall, at a minimum –

"(A) identify the parties thereto:

"(B) commit the shipper to tender and the carrier to transport a series of shipments;

"(C) contain the contract rate or rates for the transportation service to be or being provided; and

"(D)(i) state that it provides for the assignment of motor vehicles for a continuing period of time for the exclusive use of the shipper; or

"(ii) state that it provides that the service is designed to meet the distinct needs of the shipper.

"(3) RETENTION BY CARRIER. – All written agreements entered into by a motor contract carrier under paragraph (1) shall be retained by the carrier while in effect and for a minimum period of 3 years thereafter and shall be made available to the Commission upon request.

"(4) RANDOM AUDITS BY COMMISSION. – The Commission shall conduct periodic random audits to ensure that motor contract carriers are complying with this subsection and are adhering to the rates set forth in their agreements.".

(b) CIVIL PENALTY. – Section 11901(g) of such title is amended –

(1) by inserting "or enter into or retain a written agreement under section 10702(c) of this title" after "under this subtitle" the first place it appears; and

(2) by striking "or (5)" and inserting "(5) does not comply with section 10702(c) of this title, or (6)".

(c) CRIMINAL PENALTY. – Section 11909(b) of such title is amended –

(1) by inserting "or enter into or retain a written agreement under section 10102(c) of this title" after "under this subtitle" the first place it appears; and

(2) in clause (1) by inserting after "make that report" the following: "or willfully does not enter into or retain that agreement".

SEC. 7. BILLING AND COLLECTING PRACTICES

(a) IN GENERAL. – Subchapter IV of chapter 107 of title 49, United States Code, is amended by adding at the end the following:

"§ 10767. Billing and collecting practices

"(a) REGULATIONS LIMITING REDUCED RATES. – Not later than 120 days after the date of the enactment of this

section, the Commission shall issue regulations that prohibit a motor carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title from providing a reduction in a rate set forth in its tariff or contract for the provision of transportation of property to any person other than (1) the person paying the motor carrier directly for the transportation service according to the bill of lading, receipt, or contract, or (2) an agent of the person paying for the transportation.

"(b) DISCLOSURE OF ACTUAL RATES, CHARGES, AND ALLOWANCES. – The regulations of the Commission issued pursuant to this section shall require a motor carrier to disclose, when a document is presented or transmitted electronically for payment to the person responsible directly to the motor carrier for payment or agent of such responsible person, the actual rates, charges, or allowances for the transportation service and shall prohibit any person from causing a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction. Where the actual rate, charge, or allowance is dependent upon the performance of a service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time, the motor carrier shall indicate in any document presented for payment to the person responsible directly to the motor carrier for the payment that a reduction, allowance, or other adjustment may apply.

"(c) PAYMENTS OR ALLOWANCES FOR CERTAIN SERVICES. – The regulations issued by the Commission pursuant to this section shall not prohibit a motor carrier from making payments or allowances to a party to the transaction

for services that would otherwise be performed by a motor carrier, such as a loading or unloading service, if the payments or allowances are reasonably related to the cost that such party knows or has reason to know would otherwise be incurred by the motor carrier.".

(b) CONFORMING AMENDMENT. – The analysis for such subchapter is amended by adding at the end the following new item:

"10767. Billing and collecting practices.".

(C) VIOLATION. –

(1) IN GENERAL. – Section 11901 of such title is amended by redesignating subsection (l) as subsection (m) and by inserting after subsection (k) the following:

"(1) RATE DISCOUNTS. – A person, or an officer, employee, or agent of that person, that knowingly pays, accepts, or solicits a reduced rate or rates in violation of the regulations issued under section 10767 of this title is liable to the United States for a civil penalty of not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which a party incurs because of such violation. Notwithstanding any other provision of this title, the express civil penalties and damages provided for in this subsection are the exclusive legal sanctions to be imposed under this title for practices found to be in violation of the regulations issued under section 10767 and such violations do not render tariff or contract provisions void or unenforceable.".

(2) VENUE. – Section 11901(m)(2) of such title (as redesignated by paragraph (1)) is amended by striking "or (k)" and inserting "(k), or (l)".

SEC. 8. RESOLUTION OF DISPUTES RELATING TO CONTRACT OR COMMON CARRIER CAPACITIES.

Section 11101 of title 49, United States Code, is amended by adding at the end the following:

"(d) RESOLUTION OF DISPUTES RELATING TO CONTRACT OR COMMON CARRIER CAPACITIES. – If a motor carrier (other than a motor carrier providing transportation of household goods) subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title has authority to provide transportation as both a motor common carrier and a motor contract carrier and a dispute arises as to whether certain transportation is provided in its common carrier or contract carrier capacity and the parties are not able to resolve the dispute consensually, the Commission shall have jurisdiction to, and shall, resolve the dispute.".

SEC. 9. LIMITATION ON STATUTORY CONSTRUCTION.

Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to

the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974.

Approved December 3, 1993.

RULES OF THE HOUSE OF REPRESENTATIVES

Rule X

ESTABLISHMENT AND JURISDICTION OF STANDING COMMITEES.

The Committees and Their Jurisdiction

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned to it by this clause and clauses 2, 3, and 4; and all bills, resolutions, and other matters relating to subjects within the jurisdiction of any standing committee as listed in this clause shall (in accordance with and subject to clause 5) be referred to such committees, as follows:

* * *

(l) Committee on the Judiciary.

(1) Judicial proceedings, civil and criminal generally.

(2) Apportionment of Representatives.

(3) Bankruptcy, mutiny, espionage, and counterfeiting.

(4) Civil liberties.

(5) Constitutional amendments.

(6) Federal courts and judges.

* * *

Referral of Bills, Resolutions, and Other Matters to Committees

5. (a) Each bill, resolution, or other matter which relates to a subject listed under any standing committee named in clause 1 shall be referred by the Speaker in accordance with the provisions of this clause.

(b) Every referral of any matter under paragraph (a) shall be made in such manner as to assure to the maximum extent feasible that each committee which has jurisdiction under clause 1 over the subject matter of any provision thereof will have responsibility for considering such provision and reporting to the House with respect thereto. Any precedents, rulings, and procedures in effect prior to the Ninety-Fourth Congress shall be applied with respect to referrals under this clause only to the extent that they will contribute to the achievement of the objectives of this clause.

(c) In carrying out paragraphs (a) and (b) with respect to any matter, the Speaker may refer the matter simultaneously to two or more committees for concurrent consideration or for consideration in sequence (subject to appropriate time limitations in the case of any committee), or divide the matter into two or more parts (reflecting different subjects and jurisdictions) and refer each such part to a different committee, or refer the matter to a special ad hoc committee appointed by the Speaker with the approval of the House (from the members of the

committees having legislative jurisdiction) for the specific purpose of considering that matter and reporting to the House thereon, or make such other provision as may be considered appropriate.

Supreme Court, U.S.
FILED
JAN 18 1996
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No. 95-945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
Petitioner,
v.
STERLING PRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds (the "Funds") are multiemployer plans within the meaning of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1301, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, Pub. L. No. 96-364, codified in principal part at 29 U.S.C. §§ 1381-1461. As described below, the Funds are among the largest multiemployer benefit plans in the United States. The Funds were instrumental in shutting Transcon Lines

("Transcon") down and placing it into bankruptcy after it defaulted on its obligation to the Funds and fell under the control of a reputed organized crime associate. Now, the United States Court of Appeals for the Ninth Circuit has ruled that Transcon's shutdown resulted in the legitimate forfeiture of its principal asset, so that the Transcon estate cannot pay the claims of the Funds, even though they hold claims entitled to priority under 11 U.S.C. § 507(a)(4).

The Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") is a multiemployer defined benefit pension trust fund established in 1955 pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund covers 170,000 retirees presently drawing benefits and 200,000 active participants of approximately 5,000 contributing employers. The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees.

The Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund (the "Health and Welfare Fund") was established in 1950. The Health and Welfare Fund pro-

vides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1]

Interests of Central States

This case arises out of the bankruptcy of Transcon, Inc. In 1990 Transcon was one of the largest contributing employers in the Central States Funds. When the company fell behind on its contributions, and appeared to be insolvent and unable to pay Central States what it owed, Central States sought injunctive relief to restrict Transcon's operations and initiated an involuntary bankruptcy proceeding. Further, Central States sought appointment of a trustee because Transcon had recently been purchased by a company Central States feared was controlled by organized crime.[2] The Funds have filed claims against Transcon amounting to approximately $18,600,000. The right to recover undercharges is the largest asset of the Transcon bankruptcy estate. *See In re Transcon Lines,* 147 B.R. 770, 772 (Bankr. C.D. Cal. 1992) (undercharges are the "primary asset of the Transcon Lines bankruptcy estate"). Without this asset it is certain that Central States will receive little or nothing on its claims. The effect of the decision below is that Central States' prompt action to protect its rights against Transcon has had the perverse effect of eliminating the

---

[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees.

[2] The owner of the purchasing company has since been convicted and imprisoned for his racketeering activities.

only significant asset of Transcon, rather than preserving its assets as the Bankruptcy Code requires.

Transcon is not the only such shutdown bankrupt indebted to Central States. The Funds are currently owed over $175,000,000 in health and pension liabilities from the bankruptcy estates of failed contributors, including Transcon. Many of these bankruptcy estates will not be able to pay the Funds, even on their priority claims under 11 U.S.C. § 507(a)(4), if undercharges are forfeited as is required by the decision of the court below in *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) (rejecting Transcon's challenge to the Negotiated Rates Act of 1993 ("Rates Act"), Pub. L. No. 103-180, 107 Stat. 2044-53 (partially codified at 49 U.S.C. § 1071(f)).

In upholding the forfeiture of Transcon's principal asset, the Ninth Circuit stressed the supposedly "unusual" nature of the motor freight carrier industry, namely that a shutdown carrier might be solvent or financially healthy. This statement is contrary to common sense and the Funds' actual experience of the motor carrier and other businesses, whose owners are obligated to contribute to the Funds. Any shutdown business in any industry may, conceivably, be solvent, but the opposite is usually the case, both in the motor freight industry and in the other industries whose employers contribute to the Funds.

The Funds try to protect their financial integrity by preventing employers from dissipating their remaining assets while neglecting to contribute to the Funds. The decision of the Ninth Circuit means that the Funds may cause a forfeiture of the very assets sought to be preserved by shutting down the business of an irresponsible employer.

THE PETITION SHOULD BE GRANTED

The Ninth Circuit's decision in *Transcon* undermines the Bankruptcy Code and ERISA, including the MPPAA, by forfeiting the property of a motor carrier merely because it ceases to transport freight for compensation.[3] Forfeitures conditioned on the shutdown of a for-compensation business operation violate the Bankruptcy Code and ERISA and deprive shutdown employers of assets essential to paying liabilities, including the pension liabilities claimed by Central States, that arise upon shutdown.

The anti-forfeiture provisions of the Bankruptcy Code, 11 U.S.C. §§ 363(l) and 541(c)(1)(B), preclude statutory forfeitures that are conditioned on the bankruptcy, insolvency, or "financial condition" of the debtor. These provisions have vital importance to the Funds and other multiemployer benefit plans. Under the MPPAA the business shutdown of an employer triggers the employer's "withdrawal liability." 29 U.S.C. §§ 1382-83. Under these provisions, upon shutdown, the employer must pay its share of unfunded pension liabilities. Further, if the shutdown employer files bankruptcy, then the employer's bankruptcy estate will be subject to priority wage and pension claims under 11 U.S.C. § 507(a)(3)-(4). If assets are automatically forfeited by the same event that gives rise to the claims, then the claims will be unsatisfied and Congress' purpose in creating these claims will be thwarted. It is for reasons like this that under the Bankruptcy Code the employer's bankruptcy filing also invalidates any statutory (or other) forfeiture of the employer's property based on the employer's bankruptcy, insolvency, or financial condition, thereby preserving the employer's property for distribution to creditors, in-

[3] Under 49 U.S.C. § 10102(13)-(15), the forfeiture provisions of § 2 of the Rates Act apply only to a motor carrier that transports freight "for compensation."

cluding particularly creditors having priority under § 507(a)(3)-(4).

The Ninth Circuit in *Transcon* undermines this statutory scheme by permitting the employer's shutdown of its for-compensation operation to trigger a forfeiture of the employer's assets. In ordering that forfeiture, the Ninth Circuit disregards the language and legislative history of § 9 of the Rates Act. Section 9 provides:

> Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of Title 11, United States Code, relating to bankruptcy; Title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts); or the Employee Retirement Income Security Act of 1974. (107 Stat. at 2053.)

A principal impetus for the Rates Act was to eliminate the undercharge claims of bankrupt motor carriers. However, the Funds had testified before Congress that the proposed Rates Act threatened to impair the ability of bankrupt motor freight carriers to pay approximately $175,000,000 owed to the Funds for pension withdrawal liability. See The Negotiated Rates Issue and Proposed Legislative Solutions thereto: Hearing before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, H.R. Doc. No. 103-18, 103d Cong., 1st Sess., 151-52, 366-76 (1993) (statements of Thomas C. Nyhan). Whether it was in response to such testimony, or to keep the bill from the jurisdiction of the Judiciary Committee (see Petition at 8-9) or for some other reason, a compromise was struck and the bill was amended to add § 9. The obvious purpose of § 9 was to ensure that the rights of parties under the Bankruptcy Code would not be disturbed by the Rates Act. Yet under the decision below the rights to undercharge claims that companies like Transcon had prior to the Rates Act are extinguished, and a principal purpose of § 9 is not achieved.

It is quite plain, as the court below agreed, that if the property forfeiture required by § 2 of the Rates Act were conditioned on the insolvency or financial condition of *Transcon,* then, because *Transcon* is in bankruptcy, § 9 of the Rates Act would intercede to prevent the forfeiture by mandating the supremacy of §§ 363(l) and 541(c)(1) of the Bankruptcy Code. Those latter (Bankruptcy Code) provisions preclude the forfeiture of property of a bankruptcy debtor based on the debtor's insolvency or financial condition. The question, then, is whether § 2 of the Rates Act is in fact conditioned on the insolvency or financial condition of debtors like *Transcon.*

The court below was rightly concerned that default clauses in leases and contracts not circumvent the anti-forfeiture provisions of the Bankruptcy Code simply by referring to operational status rather than financial condition. "[W]e do not hold that conditioning a default on a debtor's operational status is never prohibited by the Bankruptcy Code's anti-forfeiture provisions." Petitioner's Appendix ("Pet. App.") at 19a. The court below held, nonetheless, that the "unusual nature of the motor freight industry" as it existed before the Rates Act made the financial condition of a company "not necessarily dependent on the continuation of operations." Pet. App. at 19a-20a. The court apparently believed that the very existence of undercharge claims would leave many motor freight companies solvent even if they ceased operations. Thus, according to the court, conditioning the forfeiture of the undercharge claims on the cessation of the companies' operations was not the same as a condition on financial condition. The court apparently missed the irony that the very existence of undercharge claims is what, in its view, saves the statute that, in turn, eliminates the undercharge claims. But if the undercharge claims are eliminated, then the shutdown really is a financial condition: "the financial condition of a motor carrier and its operational status are indeed related." *Id.* at 18a.

By definition, § 2 of the Rates Act is conditioned on the "financial condition" of the motor carrier. Section 2 only applies to a "carrier" that ceases to transport freight. Under 49 U.S.C. § 10102(13)-(15), "carrier" means a carrier that operates "for compensation." When a "for compensation" carriers ceases to transport freight, it necessarily has a financial condition characterized by a lack of revenues from current freight transportation. Further, any for-profit business that shuts down will also have a financial condition characterized by a lack of current revenues from the shutdown business. Any doubt on this point should have been dispelled by the undisputed declaration of Transcon's expert witness, an accountant who submitted a declaration that: "when used to describe a motor carrier of property, the words 'no longer transporting property' refer to and describe the financial condition of the motor carrier, and . . . such financial condition would have to be disclosed in an unaudited financial statement of the motor carrier of property in order for the financial statement to conform with generally accepted accounting principles for the presentation of financial information." *See* Appellant's Excerpts of Record, Vol. 3, pp. 542-43, filed May 20, 1994 in Ninth Circuit No. 94-55425.

Further, the court below actually failed to explain why § 2 of the Rates Act is any different from other contract and least default clauses that create a forfeiture. It tried to explain that because of these undercharge assets a motor carrier might cease trucking operations yet remain solvent. But this is true of many kinds of companies other than motor carriers with undercharge claims. For example, a warehouse operation is a common contributor to Central States under collective bargaining agreements with the International Brotherhood of Teamsters. A warehouse company might shut down yet remain solvent because of its real estate holdings. Now suppose title to the real estate could be forfeited to, say, the principal shareholder upon the cessation of warehouse operations. Would

it be fair to say that the forfeiture was unrelated to the financial condition of the company even though it left the company insolvent? If the court below is correct, Central States, indeed all creditors in bankruptcy, can expect to see their losses grow as such forfeiture clauses multiply.

The Funds agree with the Trustee that the decision of the Ninth Circuit conflicts with the interpretations by other courts of appeals of § 9 of the Rates Act and the words "financial condition" in the Bankruptcy Code. See Trustees' Petition, pp. 24-29.

CONCLUSION

The Trustee's petition should be granted.

Respectfully submitted,

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No. 95-945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
Petitioner,
v.
STERLING PRESS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* LLOYD T. WHITAKER, TRUSTEE OF THE BANKRUPTCY ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. What is the meaning of the words "limiting" and "affecting" in section 9 of the Negotiated Rates Act of 1993 ("Rates Act"), Pub. L. No. 103-180, 107 Stat. 2053 (uncodified), which provides that "Nothing in this Act (including any amendment made by this Act) shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy; title 28, United States Code, relating to the jurisdiction of the courts of the United States (including bankruptcy courts; or the Employee Retirement Income Security Act of 1974"?

2. Is a forfeiture that is conditioned on the shutdown of a for-compensation business a forfeiture that is conditioned on the "financial condition" of the business within the meaning of the anti-forfeiture provisions of the Bankruptcy Code, 11 U.S.C. §§ 363(1), 541(c)(1)(B)?

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Lloyd T. Whitaker, trustee of the bankruptcy estate of Olympia Holding Corporation, formerly known as P*I*E Nationwide, Inc. ("P*I*E"), files this brief in support of petitioner Leonard L. Gumport, trustee of the bankruptcy estate of Transcon Lines ("Transcon"). All parties have consented to the filing of this brief pursuant to Supreme Court Rule 37.2(a). As required by that rule, the parties' consent letters are filed with the Clerk of the Court.

P*I*E was once one of the larger interstate motor freight carriers in the United States. P*I*E formerly had more than 17,000 employees and annual revenues in excess of $963,000,000. On October 16, 1990, P*I*E filed a petition for relief under Chapter 11 of the Bankruptcy Code. *Amicus* Lloyd T. Whitaker was appointed Chapter 11 trustee on December 26, 1990 and converted the case to a Chapter 7 liquidation on March 11, 1991.

As with most bankrupt motor carriers, the principal asset of the P*I*E bankruptcy estate consists of pending claims to recover unpaid freight charges that former customers owe P*I*E. P*I*E had undercharged many of its customers. Consequently, many had paid less than the applicable filed tariff rate. Unless the Trustee recovers these undercharges, the P*I*E estate will not be able to pay the claims of P*I*E's former employees and their pension funds, even though a portion of those claims are entitled to priority under § 507(a)(3)-(4) of the Bankruptcy Code, 11 U.S.C. § 507(a)(3)-(4).

As with Transcon, P*I*E was a signatory to collective bargaining agreements that required P*I*E to make pension contributions to multi-employer pension plans. Under ERISA as amended in 1980, P*I*E's shutdown triggered withdrawal liability of more than $100,000,000 to those plans. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1461). The P*I*E bankruptcy estate can not pay that withdrawal liability without collecting the undercharges thousands of P*I*E's former customers still owe the estate.

STATEMENT

In January 1995, prior to the Ninth Circuit's opinion in *In re Transcon Lines*, 58 F.3d 1432 (1995) ("*Transcon*"), and prior to the Seventh and Eighth Circuits' divergent interpretations of section 9 of the Rates Act,[1]

[1] *See* Transcon Petition at 27-28. The Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044. Unless otherwise stated,

an impartial, expert commentator predicted the issues presented in Transcon's Petition would and indeed should reach this Court: [2]

> [T]he whole debate raises fundamental issues about the proper approach to statutory interpretation. While fascinating as an academic matter, the issue has too much practical impact for such uncertainty to continue. Perhaps billions of dollars are at stake. The Supreme Court has already taken several swings at the freight undercharge issue in the 1990s. The Court may well have another turn at the undercharge plate in the near future, as the NRA debate works its way through the courts.

Warren, Gorham & Lamont, *Bankruptcy Law Letter*, Vol. 15, No. 1, at 3 (Jan. 1995) ("*Law Letter*"). This commentator explained how the tension between sections 2 and 9 of the Rates Act raises these fundamental issues of statutory interpretation:

> The primary purpose of the NRA was to stop the collection of undercharge claims by defunct motor carriers. The difficult issue that has plagued the courts is how to square Sections 2 and 9 of the NRA. As noted above, Section 9 plainly subordinates the NRA to the Bankruptcy Code. Section 2, however, would radically alter the rights of bankruptcy trustees of carriers by making it much more difficult to collect undercharges.

Stating that section 9 resulted from "a fascinating behind-the-scenes tale of committee power struggles and

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all capitalized terms have the definitions specified in Transcon's Petition.

[2] The importance of the issues was also evident to the Ninth Circuit's Chief Judge. At the conclusion of oral argument in the Ninth Circuit and prior to filing its decision, Chief Judge Wallace stated: "Somehow I feel that this was a moot court this morning and that no matter who wins or loses that there's another court that you all have your eye on . . . ." Tape of oral argument of October 6, 1994 in Ninth Cir. No. 94-55425.

ambiguous compromises," this commentator further explained:

> In short, the Public Works Committee of the House assumed responsibility for the anti-undercharge legislation. The Judiciary Committee, however, asserted legislative jurisdiction, arguing that the bill implicated bankruptcy law and procedure and the division of adjudicatory responsibility between the courts and administrative agencies. To keep the Judiciary Committee from taking over the bill and holding hearings on it, the Public Works Committee added a new Section 9 to the NRA, which as enacted provides:
>
> > Nothing in [the NRA] . . . shall be construed as limiting or otherwise affecting application of title 11, U.S.C., relating to bankruptcy; title 28, U.S.C., relating to jurisdiction of the courts of the United States (including bankruptcy courts) . . . .

Law Letter, at 2; *see* Appendices A and B hereto.[3]

As stated, the Ninth Circuit filed its opinion in *Transcon* following publication of these comments, but nevertheless *Transcon* fails to address the fundamental issues of statutory construction this case presents. Instead, the Ninth Circuit declares in conclusory terms that section 9 of the Rates Act "is clear," but without ever explaining (a) why it is so clear that the words "limiting or otherwise affecting" in section 9 mean only "amending," or (b) how it justifies deciding, as it did, to limit the scope of the term "financial condition" in the Bankruptcy Code in order to avoid "potential conflicts" with section 2 of

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[3] *See also The Negotiated Rates Issue and Proposed Legislative Solutions thereto: Hearing before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation*, H.R. Doc. No. 103-18, 103d Cong., 1st Sess. 319-22 (1993) ("*Hearings*") (1992 demands for sequential referral to Judiciary Committee) and H.R. Rep. No. 359, 103d Cong., 1st Sess. 7, 13-17 (1993) (1993 correspondence regarding demands of Judiciary Committee for sequential referral).

the Rates Act despite section 9's express prohibition against "limiting" the Bankruptcy Code. *See* Transcon Petition, at 13a, 20a. As the Transcon Petition correctly notes at 27-28, neither the Seventh nor Eighth Circuits agrees with the Ninth Circuit's interpretation of section 9, and all three circuit courts misinterpret its meaning because all three disregard section 9's language and legislative history. Because millions, possibly billions, of dollars are at stake, as are the rights of thousands of employees to receive their unpaid wage and pension claims, and because the integrity of the legislative process and its committee rules are in jeopardy, this Court should grant Transcon's petition.

ARGUMENT

I. THIS CASE RAISES FUNDAMENTAL ISSUES OF STATUTORY INTERPRETATION

The proper interpretation of section 9 of the Rates Act raises "fundamental issues" about the proper approach to interpretation of statutes. *See Law Letter*, at 3. That fundamental issue involves giving effect to the legislative compromise two congressional committees, with concurrent jurisdiction over a pending bill, have struck to ensure its enactment.

As reflected by Rule X of the Rules of the House of Representatives, Congress allocates committees legislative jurisdiction of all bills affecting specific subject matter. *See* Transcon Petition, at 132a-134a. This rule ensures that the committee (and staff) with the requisite expertise has an opportunity to review a bill before it is enacted. As in the case of the Rates Act, a committee may refrain from demanding referral of a bill when another committee includes in the bill a guarantee that the bill will not limit or affect laws within the allocated legislative jurisdiction of the other committee. This path of compromise is one alternative rules-driven accommodation that must occur whenever a congressional committee sponsors a bill to alter the substantive law of an area outside its own juris-

diction. It must be prepared either to permit the other committee(s) with jurisdiction to hold hearings on that bill or, as in the case of the Rates Act, to amend the bill to avoid the substantive overlap with the other committee's jurisdiction. Failure of the sponsoring committee to navigate either course of accommodation prevents the congressional committee with the requisite expertise and staff from hearing and reviewing the proposed legislation. The legislative product of accommodation through amendment generates confusing, deceptive statutory language and conflicting, ambiguous legislative history when the compromise occurs at the eleventh hour in the legislative process and the resulting language and history are reviewed in isolation without giving effect to all the words of the statute. The legislation tends to be self-contradictory; specific provisions alter substantive law while others disclaim any intent to change that law.

This Court has warned lower courts about how to interpret legislative compromises. As this Court stated in *Board of Governors of the Federal Reserve System v. Dimension Financial Group*, 474 U.S. 361, 374 (1986):

> Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

In *Transcon*, the Ninth Circuit pays lip service to *Board of Governors*, but fails to heed its lesson in statutory construction, failing to give proper effect to the fruits of the "fascinating behind-the-scenes tale of committee power struggles and ambiguous compromises." *Law Letter*, at 2.

In this case, the Public Works Committee initially sought to use its legislative jurisdiction of title 49 (transportation) to adopt provisions that would have the substantive effect of limiting and affecting title 11 (bankruptcy) and title 28 (jurisdiction), matters entrusted to the Judiciary Committee. The Judiciary Committee pro-

tected its jurisdiction of those matters. It insisted on the addition of section 9 to the Rates Act for the express purpose of preventing the Rates Act from either "limiting" or "affecting" title 11 or 28. *See Law Letter*, at 2; Transcon Petition, at 5-10. By narrowly construing the Rates Act's section 9 and by using the Rates Act's section 2 as an excuse for narrowly interpreting the words "financial condtion" in title 11, the Ninth Circuit unravels the legislative compromise and defeats the purpose and defies the language of section 9 of the Rates Act.[4] *See* Transcon Petition, at 28.

Today, if the Ninth Circuit's decision stands, the Public Works Committee has successfully limited the jurisdiction of bankruptcy courts under title 28 and limited the anti-forfeiture provisions of title 11 while purporting to amend only title 49, despite adding express disclaimers of such limitations in section 9 of the Rates Act. Tomorrow, other congressional committees and special interests may target this Court and its jurisdiction for curtailment, circumventing the Judiciary Committee through similarly

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[4] Notwithstanding the express language of Rates Act's section 9, the Eighth Circuit concluded that section 9 merely prevents the Rates Act from impairing the jurisdiction of courts, delineated in title 28, not the substantive provisions of the Bankruptcy Code, which appear in title 11. *See In re Jones Truck Lines, Inc.*, 57 F.3d 642, 646 (8th Cir. 1995) (*"Jones"*).

The Eighth Circuit focused on statements made in the Congressional Record on November 15, 1993 by Mr. Brooks, Chair of the Judiciary Committee. *See* 139 Cong. Rec. H9603 (Nov. 15, 1993). However, as the typeface of those statements reflect, they were not actually spoken, but were appended after the fact. *See id.* By that time, Mr. Brooks had already received written assurances from the proponent of the Rates Act that: "we do not intend in this legislation to affects [*sic*] either the Bankruptcy Code or the jurisdiction of the bankruptcy courts." H.R. Rep. No. 359, 103rd Cong., 1st Sess., at 16 (1993). Mr. Brooks addressed only jurisdictional issues on the floor of the House because the text of proposed section 9 did not mention title 28 (but did mention title 11) when favorably reported earlier in the day by the Public Works Committee. *See* H.R. Rep. No. 359, *supra*, at 13.

deceptive legislation that disclaims any intent to limit or affect title 28 or other laws within the purview of that committee.

II. THE "ABSURDITY" AND "REPEAL-BY-IMPLICATION" ARGUMENTS HAVE NO MERIT

In *Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621 (7th Cir. 1995) (*"Lifschultz"*), the Seventh Circuit noted that lower courts have found that section 2 of the Rates Act repeals by implication any contrary provision of the Bankruptcy Code. 63 F.3d at 626-27. The repeal-by-implication argument is untenable in light of this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*"TVA"*). In *TVA*, Chief Justice Burger explained the role of courts in resolving conflicting federal legislation where a subsequent federal law conflicts with a prior enactment. In that case, the Endangered Species Act proscribed the completion of a dam, while a subsequently enacted appropriations bill authorized expenditure of funds to complete the dam. Noting that "repeals by complication are not favored," 437 U.S. at 189, the Court concluded that the subsequent appropriations bill did not repeal the prior Endangered Species Act and, accordingly, the dam could not be completed even though Congress had specifically appropriated funds for that purpose by subsequent statute.

In stressing that carriers subject to section 2 of the Rates Act are almost exclusively in bankruptcy, the Seventh Circuit in *Lifschultz* implied that it would be absurd if section 2 did not forfeit the undercharge claims of such carriers. The "absurdity" principle fails to support permitting section 2 to override the anti-forfeiture provisions of the Bankruptcy Code for three reasons. First, the factual basis of this argument is mistaken; many non-operating carriers are not in bankruptcy.[5] Second, under

[5] The Seventh Circuit justified section 2's forfeiture on the ground that: "The class of carriers and claims treated by the Act

the decisions of this Court, the mere fact that section 2 has an unexpected result does not justify rewriting either section 9 of the Rates Act or the anti-forfeiture provisions of the Bankruptcy Code. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 284-85 (1980) (when a statute has "compelling" language that produces "incongruities," then "the federal courts may not avoid them by rewriting or ignoring that language"). Third, the express terms of 11 U.S.C. §§ 363(*l*) and 541(c)(1)(B) contemplate they can and will invalidate an otherwise "applicable law" (§ 363(*l*)) or "applicable nonbankruptcy law" (§ 541(c)(1)(B)) seeking to modify the property rights of a debtor based on its financial condition. The claim of "absurdity" is really an attack on the anti-forfeiture policies Congress mandated in §§ 363(*l*) and 541(c)(1)(B). In enacting those provisions, however, Congress plainly understood that ill-advised legislators would occasionally enact laws that forfeited assets of debtors based on their financial condition. Armed with that knowledge and understanding, Congress decided that these subsequently enacted laws should be unenforceable, unless they duly amended title 11, which the Rates Act explicitly does not do.

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is almost entirely comprised of bankrupt carriers." *Lifschultz*, 63 F.3d at 625. In contrast, the Ninth Circuit in *Transcon* justified section 2's forfeiture of the undercharges of non-operating carriers on the ground that "many" shutdown carriers have remained "solvent and financially healthy" by suing their former customers. Transcon Petition, at 19a-20a.

Neither analysis is correct. The legislative record does not reflect *any* "solvent" or "financially healthy" shutdown carrier is suing its former customers (which would seem a counterproductive business tactic for a solvent and financially healthy carrier). *See Hearings*, 296-305. Similarly, the legislative record also reflects that of 140 known shutdown carriers, only 70 have filed bankruptcy. *Id.* The Eighth Circuit adds to the confusion by insisting that section 9 of the Rates Act, which expressly refers to title 11 and title 28, only addresses jurisdictional issues, exclusively a title 28 matter. *See Jones*, 57 F.3d at 646.

The argument that Transcon's position nullifies the Rates Act is overblown. The anti-forfeiture provisions of the Bankruptcy Code merely prevent section 2 of the Rates Act from forfeiting the undercharges of non-operating carriers that are debtors in bankruptcy cases. Under Transcon's position, each provision of the Rates Act still serves a vital purpose: (1) section 2 of the Rates Act will forfeit the undercharge claims of those non-operating carriers that did not or do not file bankruptcy (including A-Line),[6] and bankruptcy courts will remain free, under 11 U.S.C. §§ 305(a), 1112(b), to dismiss the bankruptcy cases of those non-operating carriers engaging in abusive collection practices or failing to make substantial distributions to their creditors; and (2) the remaining provisions of the Rates Act, §§ 3-9, all have full operative effect since none is conditioned on the non-operating financial condition of the carrier.

III. THE ANTI-FORFEITURE AND FILED RATE ISSUES THE PETITION PRESENTS ARE BOTH IMPORTANT

A. Forfeiture Clauses Are in Widespread Use

Because the effect of section 2 of the Rates Act is by no means unique, the Ninth Circuit's opinion has implications far beyond the estates of bankrupt motor carriers. Government agencies, insurers, joint venturers, franchisors, and lenders make widespread use of forfeiture provisions (without employing the Bankruptcy Code's trigger phrase, "financial condition") to rid themselves of entanglements with any entity suffering a business reversal or shutdown, even though its assets are most needed at that time to compensate employees and other creditors. *See, e.g., In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) (gov-

[6] The legislative record reflects that of the 140 carriers that have shut down since 1980, approximately 70 of these carriers have not filed bankruptcy. *See Hearings*, 297-304; *see also supra*, note 5. Section 2 applies to this 50 percent.

ernment regulation that forfeit airline's landing slot based on non-use); *In re Transcon Lines (Gumport v. ICC)*, 147 B.R. 770, 775 (Bankr. C.D. Cal. 1992) (regulations of ICC that attempted to prevent non-operating carriers from collecting undercharges);[7] *Matter of Daugherty Construction, Inc.*, 188 B.R. 607, 609 (Bankr. D. Neb. 1995) (example of standard form partnership agreement providing for dissolution of partnership upon bankruptcy or dissolution of any partner); King, *Collier Lending Institutions and the Bankruptcy Code* ¶ 2.51, at 2-177 (1993) (example of standard form loan agreement specifying as an event of default the "Debtor ceas[ing] to conduct its business as the same is now conducted in the ordinary course of its business"); *see also In re Government Securities Corp.*, 972 F.2d 328, 329 (11th Cir. 1992) (forfeiture of benefits of fidelity bond if company is taken over by a liquidator), *cert. denied* 507 U.S. ——, 122 L.Ed.2d 744 (1993).

Accordingly, in light of the widespread use of such forfeiture provisions, the extent to which these provisions may be enforced in bankruptcy cases, notwithstanding 11 U.S.C. §§ 363(*l*) and 541(c)(1)(B), will have great significance beyond the trucking business.[8]

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[7] *See also In re Transcon Lines (Gumport v. ICC)*, 178 B.R. 228 (Bankr. C.D. Cal. 1995) (awarding attorneys fees against the ICC for its unjustified conduct in promulgating regulations to prevent non-operating carriers from collecting undercharges). The district court affirmed this decision in an unpublished opinion, and the ICC recently filed an appeal from the judgment of the district court.

[8] Uncontroverted and undisputed expert testimony in Transcon's case showed that the Rates Act forfeited Transcon's assets based on its "financial condition." S. Chelliah, an accountant certified in the United States and chartered in the United Kingdom, submitted a declaration that, "when used to describe a motor carrier of property, the words 'no longer transporting property' refer to and describe the financial condition of the motor carrier, and . . . such financial condition would have to be disclosed in an audited financial statement of the motor carrier of property in order for the finan-

B. Congress Has Declined To Repeal the Filed Rate Doctrine

Despite the extensive criticism and controversy that surrounds the filed rate doctrine, Congress has repeatedly declined to repeal it. Indeed, except for section 2(a) of the Rates Act targeting shutdown carriers, the Rates Act, in sections 2(e)(4), 4(b), and 7, reaffirms the filed rate doctrine and directs the ICC to adopt regulations implementing it. In 1995, in the "Trucking Industry Regulatory Reform Act," Pub. L. No. 103-311, 108 Stat. 1683, Congress modifies the filed rate doctrine, but directs that the tariffs that collective rate-making bureaus file with the ICC continue to have effect. Finally, on December 30, 1995, President Clinton signed into law the "ICC Termination Act of 1995," Pub. L. No. 104-88, abolishing the ICC, but, significantly, not abolishing the filed rate doctrine even though Congress could readily have done so if a consensus had existed for accomplishing that result.

IV. EACH OF THE CONFLICTING CIRCUIT COURT INTERPRETATIONS OF RATES ACT SECTION 9 IS UNTENABLE

A. *Seventh Circuit:*

Stating that section 9 of the Rates Act is ambiguous, the Seventh Circuit ruled it would enforce the specific provisions of the Rates Act's section 2, even if enforcement would affect bankruptcy cases under title 11, except when there was a "direct" conflict with the provisions of the Bankruptcy Code. *See Lifschulz*, 63 F.3d at 625. The Seventh Circuit overlooked the direct conflict between the forfeiture provisions of section 2 of the Rates Act and the Bankruptcy Code: (1) section 2 of the Rates Act

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cial statement to conform with generally accepted accounting principles for the presentation of financial information." *See* Appellant's Excerpts of Record, Vol. 3, pp. 542-43, filed May 20, 1994 in Ninth Cir. No. 94-55425.

forfeits between 80 and 100 percent of the undercharges of a motor freight carrier that shuts down its business, while (2) sections 363(b) and (*l*) of the Bankruptcy Code permit use of a bankrupt carrier's property outside the ordinary course of business and regardless of any applicable law that purports to forfeit property of the debtor based on its financial condition.

B. *Eighth Circuit*:

The Eighth Circuit ruled section 9 of the Rates Act was merely "a response to concerns that portions of the [Rates Act] would transfer jurisdiction over bankrupt carriers to the ICC." *Jones*, 57 F.3d at 646. This conclusion conflicts with the language and legislative history of section 9 of the Rates Act. Its language expressly prohibits section 2 of the Rates Act from "limiting or otherwise affecting" either title 11 or title 28; the statutory provisions on bankruptcy jurisdiction appear only in title 28. *See* 28 U.S.C. §§ 157 and 1334. As a part of the legislative compromise, the Public Works Committee deliberately agreed with the Judiciary Committee that the Rates Act would amend neither title 11 nor title 28, not just title 28. *See*, Appendices A and B hereto. The Eighth Circuit arrived at the opposite conclusion, focusing only on comments of legislators to include title 28 in section 9 of the Rates Act at a time in the legislative process when section 9 of the Rates Act already clearly excluded title 11. See *supra*, note 4.

C. *Ninth Circuit*:

Contradicting the Seventh Circuit's conclusion that section 9 of the Rates Act is "susceptible to two interpretations," *Lifschultz*, 63 F.3d at 625, the Ninth Circuit in *Transcon* ruled the words "limiting" and "affecting" are merely synonmys for the word "amending." *Transcon*, 58 F.3d at 1438. The Ninth Circuit then used section 2 of the Rates Act as a basis for arriving at a narrow

definition of the words "financial condition" in 11 U.S.C. §§ 363(*l*) and 541(c)(1)(B). *Transcon*, 58 F.3d at 1440. The Ninth Circuit thereby violated the explicit command of section 9 of the Rates Act that the Act shall not be construed as "limiting or otherwise affecting" title 11.

V. RATES ACT SECTION 9 RESULTED FROM CONCERNS AT LEAST AS COMPELLING AS THOSE THAT LED TO RATES ACT SECTION 2

Advocates of forfeiting undercharges invariably criticize the filed rate doctrine and the litigation it has spawned. However, if the filed rate doctrine was so clearly without purpose, Congress could have altered section 2 of the Rates Act to specify a 100-percent forfeiture of all undercharges and further to specify that section 2 is not subject to the limitations of section 9 of the Rates Act. Congress did not do so, despite vitriolic attacks on the filed rate doctrine, because of the effective, compelling opposition from the Judiciary Committee, bankruptcy trustees, pension funds, and labor organizations. *See* Appendices A and B hereto; *see also Hearings*, at 148-63, 169-74.

For example, during the 1993 hearings on the proposed Rates Act, representatives of Transcon and the Central States pension funds testified as quoted in Transcon's Petition at 7-8. In addition, a labor representative testified during those hearings to the continuing need of former trucking employees for strict enforcement of the filed rate doctrine:

> Thousands of employees, including members of my local, did not receive wages, severance, vacation pay and other monies owed to them when their carrier employers went bankrupt. Contributions were not made to their pension and health and welfare plans. The aggregate debts owed to employees and their pension, health and benefit plans are enormous, probably in the hundreds of millions of dollars.

Hearings, at 149 (testimony of R. Ken Hall). Faced with this testimony, the proponents of the Rates Act had good reason to accede to the Judiciary Committee's demand that section 9 be added to the Rates Act. *See* Appendices A and B hereto; *see also* Transcon Petition, at 7-8.

CONCLUSION

For the foregoing reasons, and in addition to the reasons stated in Transcon's Petition, this Court should issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

TEXT OF NOVEMBER 10, 1993 LETTER FROM THE CHAIR OF THE JUDICIARY COMMITTEE TO THE CHAIR OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

November 10, 1993

The Honorable Norman Mineta
Chairman
Committee on Public Works and Transportation
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Yesterday, the Committee on Public Works and Transportation approved H.R. 2121, the Negotiated Rates Act of 1993.

Among other things, the legislation specifies procedures for the resolution of undercharge claims in pending and future bankruptcy case. Under the legislation, disputes and issues currently within the jurisdiction of the Federal courts (and the bankruptcy courts) would be subject to resolution by the Interstate Commerce Commission instead. This contravenes and directly intersects with bankruptcy law, which mandates that the courts supervise and manage a debtor's affairs and the disposition of claims after a debtor has entered bankruptcy. A related bill, S. 412, has been approved by the Senate and is pending before the Committee on Public Works and Transportation.

As you are aware, under Rule X of the Rules of the House of Representatives, the legislation, as currently drafted, implicates two separate areas of subject matter clearly within the jurisdiction of the Committee on the Judiciary; bankruptcy law and procedure and the proper division of adjudicatory responsibility between courts and administrative agencies.

The Committee on the Judiciary has had no opportunity whatsoever to review the legislation and consider

its impact on the bankruptcy system, administrative law and the jurisdiction of the Federal courts. Such an opportunity is essential if the Committee is to carry out its mandate to ensure the integrity and consistency of the Code in these areas of the law.

For these reasons, absent an amendment to strike or modify the implicated provisions and accompanying legislative history, I would feel compelled to seek a sequential referral of H.R. 2121 and any similar legislation. In addition, should these or similar provisions be included in legislation scheduled for conference, I would request that Members of the Committee on the Judiciary be named as conferees for the consideration of such provisions.

Norm, I know and appreciate your understandable desire to move the legislation to the Floor for consideration before the close of the first session. I would therefore hope that we can work together cooperatively as we have done so often in the past—in order to bypass the need for a formal request by my Committee for a sequential referral of H.R. 2121.

Meanwhile, with best wishes, I am

Sincerely,

/s/ Jack Brooks
JACK BROOKS
Chairman

cc: The Honorable Nick Rahall
Chairman
Subcommittee on Surface Transportation
Committee on Public Works and Transportation
The Speaker
H-204 Capitol
Washington, D.C. 20515-6501

APPENDIX B

TEXT OF NOVEMBER 15, 1993 LETTER FROM THE CHAIR OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION TO THE CHAIR OF THE JUDICIARY COMMITTEE

November 15, 1993

Hon. JACK BROOKS
Chairman, Committee on the Judiciary
Rayburn House Office Building, Washington. DC.

DEAR MR. CHAIRMAN: Thank you for your letter on H.R. 2121, the Negotiated Rates Act of 1993.

Because of your Committee's jurisdiction over Federal courts and bankruptcy, I recognize your right to request a sequential referral of H.R. 2121. However, and in accordance with your letter, I am pleased that we were able to agree on language clarifying that we do not intend in this legislation to affects [sic] either the Bankruptcy Code or the jurisdiction of the bankruptcy courts. Based on our agreement, it is my understanding that you will not pursue your request for a sequential referral.

I further recognize that in pursuing referral, your action will in no way be construed as a waiver of any jurisdiction your Committee has related to this issue. I will gladly include our exchange of correspondence on this matter in the Record during House consideration of H.R. 2121 and in any report by the Committee on Public Works and Transportation on H.R. 2121.

Sincerely yours,

NORMAN MINETA,
Chair, Committee on Public Works and Transportation.

Supreme Court, U.S.
FILED
JAN 29 1996
CLERK

No. 95-945

In the
Supreme Court of the United States
OCTOBER TERM, 1995

LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
Petitioner,

v.

STERLING PRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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January 1996

20 pp

QUESTIONS PRESENTED

1. Whether application of section 2 of the Negotiated Rates Act of 1993 violates sections 363(l) and 541(c)(1)(B) of the Bankruptcy Code?

2. Whether section 9 of the Negotiated Rates Act of 1993 prohibits application of section 2 of that same Act to undercharge claims of bankrupt motor carriers?

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In the
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-945

LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
Petitioner,

v.

STERLING PRESS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 58 F.3d 1432. The opinion of the district court (Pet. App. 24a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1995 (Pet. App. 1a). On September 14, 1995, the court of appeals denied rehearing and suggestion for rehearing en banc. The petition was filed on December 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner, the Trustee of Transcon Lines ("Transcon"), a bankrupt motor carrier, seeks to prevent application of the Negotiated Rates Act of 1993 ("NRA") to undercharge claims he asserted against respondent Sterling Press, Inc. ("Sterling").[1] In *Maislin Industries v. Primary Steel*, 497 U.S. 116 (1990), while holding that the filed rate doctrine demanded strict adherence to tariff rates under former §§ 10761 and 10762 of the Interstate Commerce Act,[2] this Court observed that "it is the responsibility of Congress to modify or eliminate these sections" if they have become an anachronism in the wake of the Motor Carrier Act of 1980. *Maislin*, 497 U.S. at 136. In response to this Court's invitation and the epidemic of undercharge cases filed by petitioner and other nonoperating motor carriers, Congress enacted the NRA,[3] thereby providing relief to shippers faced with

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[1] *Amici curiae* Lloyd T. Whitaker, the Trustee of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("Whitaker") and the Central States, Southeast and Southwest Area Health and Welfare and Pension Funds ("Funds") have filed briefs in support of petitioner.

[2] Unless otherwise indicated, all citations to Title 49 are to sections as they existed prior to the recent enactment of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"). The ICCTA renumbered those sections of Title 49 which were reenacted.

[3] H.R. Rep. No. 359, 103d Cong., 1st Sess. 9 (1993), *reprinted in* 1994 U.S. Code Cong. & Admin. News 2534, 2536. The purpose of the NRA "is to provide a statutory

undercharge claims asserted by a carrier, or by a person representing such a carrier, which "is no longer transporting property." Section 2(a) of NRA.[4]

In addition to establishing statutory formulas for settling undercharge claims,[5] the NRA relieved small business concerns, such as Sterling, of any and all liability for undercharges above the rate originally billed and paid.[6] Furthermore, section 2(e) legislatively ameliorated the filed rate doctrine for motor carrier service provided before September 30, 1990, by making it an "unreasonable practice" for a nonoperating carrier to seek undercharges for that service. ICCTA now "expands and codifies the undercharge relief provided in section 2(e)" of NRA by

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process for resolving disputes for claims involving negotiated transportation rates brought about by trustees for non-operating motor carriers for past transportation services" (*id.* at 7). These disputes arose when motor carriers, after negotiating individual rates for particular transportation services, failed "to properly file the negotiated rate with the ICC or when certain conditions trigger tariff provisions cancelling tariff discounts" (*id. at 8).* Petitioner filed in excess of 30,000 suits against former Transcon customers, even though no such claims were raised when Transcon was operating.

[4] *See* 49 U.S.C.A. § 10701(f)(1)(A)(West Supp. 1995), now codified at 49 U.S.C. § 13709(a)(1)(A).

[5] *See* 49 U.S.C.A. § 10701(f)(2)-(4)(West Supp. 1995), now codified at 49 U.S.C. § 13709(b)-(d))

[6] *See* 49 U.S.C.A. § 10701(f)(9)(West Supp. 1995), recodified at 49 U.S.C. § 13709(h)(1)(A).

"removing the September 30, 1990 cut-off date." H.R. Rep. No. 422, 104th Cong., 1st Sess. 209 (1995).[7]

2. Petitioner sued Sterling to collect $28,269.61 of alleged undercharges for transportation provided by Transcon prior to its bankruptcy filing. This amount is in addition to the charges which Transcon had originally billed Sterling and which Sterling had paid. In response, Sterling filed a Motion to Dismiss and/or for Summary Judgment and invoked the "small business" exemption of the NRA as a defense to the Trustee's undercharge claims.

3. Following withdrawal of reference to the district court, petitioner resisted dismissal, claiming that §§ 2(a) through (c) and 2(e) through (g) of NRA are rendered unenforceable by provisions in the Bankruptcy Code, namely 11 U.S.C. §§ 362(a)(3), 363(l) and 541(c)(1), because these sections of the NRA are assertedly "conditioned on the insolvency or financial condition of the debtor" (Pet. App. 47a). On March 22, 1994, the district court rendered its oral decision rejecting petitioner's arguments and finding that NRA "cannot be

---

[7] Contrary to the argument of *amicus* Whitaker that "Congress has declined to repeal the filed rate doctrine" (Br. 12), the expansion of the unlawful practice defense in the ICCTA (49 U.S.C. § 13711, 109 Stat. 877-878), coupled with the elimination of the tariff requirements for all motor carriers except those engaged in the noncontiguous domestic trade and household goods transportation (49 U.S.C. § 13702, 109 Stat. 868-869), has effectively obliterated the statutory basis for the filed rate doctrine. Hence, that doctrine is largely of historical, not current, importance.

reasonably construed or interpreted as a statute in which the benefits and remedies are . . . 'conditioned on the insolvency or financial condition of the debtor'" (Pet. App. 47a). Rather, the plain words of the NRA's remedial provisions apply to "carriers who have stopped the business of carrying" (*id.* at 48a).

The district court also rejected petitioner's alternate argument that section 9 of NRA prohibits application of section 2 of that Act to the claims asserted by the bankruptcy estate of a motor carrier. *Id.* at 87a. Petitioner appealed to the Ninth Circuit Court of Appeals.

4. The court of appeals held that the clear, unambiguous language of section 9 "prohibits any construction of the [NRA] which would have the effect of 'limiting' or 'affecting' the application of the Bankruptcy Code" (Pet. App. 13a). However, it affirmed on the grounds that section 2 of the NRA "is not conditioned on the insolvency or financial condition of the debtor, and therefore does not create a conflict with the Bankruptcy Code's antiforfeiture provisions" (Pet. App. 20a).

ARGUMENT

I. There Is No Conflict Among The Circuits.

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner erroneously asserts (Pet. 24-28) that the court of appeals' decision conflicts with decisions of other circuit courts. All courts of appeals which have considered the issues -- a total of six circuits -- have sustained the validity of the NRA and rejected the arguments raised by petitioner herein. *See*

Jones Truck Lines v. Whittier Wood Products Company, 57 F.3d 642 (8th Cir. 1995); *In the Matter of Lifschultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir. 1995); *In re: Bulldog Trucking, Incorporated v. B & L, Incorporated*, 66 F.3d 1390 (4th Cir. 1995); *In re Olympia Holding Corporation v. Power-Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995); *Hargrave v. United Wire Hanger Corp.*, __ F.3d ___, 1996 WL 5852 (3rd Cir. 1996).[8] Neither petitioner nor the *amici* have mentioned the reasoning expressed by the Fourth and Eleventh Circuits in rejecting arguments that are virtually identical to those advanced by petitioner and *amici* herein.

Because every court of appeals to address the issue has held that there is no conflict between the NRA and the Bankruptcy Code, petitioner is reduced to pointing to

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[8] The uniformity of holdings with respect to the NRA is reflected in the Third Circuit's terse observation in *Hargrave*, __ F.3d ___, 1996 WL 5852 *1, that:

> Many courts have addressed these questions, and virtually all of them (including every Court of Appeals to address the issue) have found in favor of the defendant shipper. Because so many opinions have already been written on this abstruse subject, we elect not to consume more trees from the forest. Rather we strongly endorse (and adopt) the reasoning of *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621 (7th Cir. 1995), the latest in the growing line of cases.

insignificant differences in the rationale expressed by the various circuits. Such minor differences in reasoning, however, do not create a conflict worthy of this Court's consideration.

II. Section 2 of the NRA Does Not Conflict With The Antiforfeiture Provisions of the Bankruptcy Code.

Petitioner (Pet. 18-28) and *amici* Funds (Br. 7-9) contend that application of section 2 of the NRA results in a forfeiture of assets contrary to the anti-forfeiture provisions of the Bankruptcy Code codified at 11 U.S.C. §§ 363(l) and 541(c)(1)(B). According to petitioner and *amici* Funds, there is no distinction between a motor carrier's "financial condition" as used in the Bankruptcy Code and its "non-operating" condition as used in the NRA. Therefore, the argument goes, because the NRA defenses, by definition, are based on the financial condition of the motor carrier, they conflict with the anti-forfeiture provisions which "protect each and every debtor in bankruptcy from the enforcement of any . . . non-bankruptcy statute that forfeits or modifies property of the debtor based on its bankruptcy, insolvency, or 'financial condition.'" (Pet. 19-20).

Relying on the plain meaning of the language used by Congress in section 2 of the NRA, which applies only to carriers "no longer transporting property," the court of appeals rejected petitioner's construction. As the court of appeals held, "section 2 is not *'conditioned on'* the insolvency or financial condition of the debtor" (Pet. App. 18a) (emphasis in original). Because the "term 'financial condition' represents a concept that is somewhat broader than operational status," (Pet. App. 19a), the clear

wording of the NRA relating to a carrier's operational status embodies a concept that is distinct from a "motor common carrier's solvency or financial condition" (Pet. App. 20a). This holding reflects the court's recognition (Pet. App. 17a) that it is possible both "for a carrier to stop transporting freight and yet remain solvent" *and* "for a carrier to seek bankruptcy protection and still continue to transport property under a plan of reorganization." In the latter situation, when a carrier enters bankruptcy but continues operating, the NRA defenses are not applicable. In view of these clear distinctions, section 2 "does not create a conflict with the Bankruptcy Code's antiforfeiture provisions" (*id.*).

The Ninth Circuit's holding is consistent with those of the other circuits that have addressed the same "financial condition" argument raised here by petitioner and *amici*. As the Eighth Circuit recognized in *Jones*, the NRA's distinction between operating and non-operating carriers is founded on the common sense proposition that:

> Carriers which are still operating, whether in bankruptcy or not, have an incentive to maintain good relations with customers and are less likely to file undercharge claims. Regardless of their financial condition, nonoperating carriers have no such incentive and seem more likely to pursue undercharge claims. . . . That many and perhaps most nonoperating carriers have also filed for bankruptcy undermines neither the logic of the line Congress drew nor the clarity with which it was drawn.

57 F.3d at 649; *accord Bulldog*, 66 F.3d at 1398; *Olympia*, 68 F.3d at 1308.[9]

Furthermore, the court of appeals' construction is consistent with the plain wording used by Congress, and "effectuate[s] congressional intent" (Pet. App. 20a) while avoiding "potential conflicts in statutory provisions" (*id.*). As such, the court's construction is consistent with this Court's observation that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R.R. Co.*

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[9] The Seventh Circuit in *Lifschultz* and the Third Circuit in *Hargrave* join the Eighth, Fourth, and Eleventh Circuits in holding that the NRA's "small business" exemption, 49 U.S.C.A. § 10701(f)(9), does not violate the Code's "anti-forfeiture" provisions for an additional reason: It is an "unconditional" exemption from liability that can be asserted against the undercharge claims of all motor carriers, not just those who are no longer operating. *Lifschultz*, 63 F.3d at 629-32; *Hargrave*, 1996 WL 5852, at 2; *Jones*, 57 F.3d at 647-49; *Bulldog*, 66 F.3d at 1396-97; *Olympia*, 68 F.3d at 1308. The court of appeals in this case noted (Pet. App. 6a) that the Eighth Circuit had held the small business exemption applicable regardless of operating status, but indicated (Pet. App. 7a) that this position was not "addressed extensively" by the parties here. The court of appeals found that it need not reach that issue if it determined, as it did, that "nonoperational status" is not "equivalent to conditioning [the application of section 2] on the insolvency or financial condition of the debtor." *Id.*

v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510 (1989).[10]

Petitioner's claims, which are based upon a strained interpretation of the statutory language, would not only create an insurmountable conflict between the Bankruptcy Code and the NRA, but would also abrogate the very core of the NRA's purpose of "resolving disputes for claims involving negotiated transportation rates brought about by trustees for non-operating motor carriers for past transportation services" (H.R. Rep. 359 at 7).[11] Indeed, as *amici* Whitaker ultimately contends (Br. 9), the NRA would apply only to "the undercharge claims of those non-operating carriers that did not or do not file bankruptcy." Such arguments with regard to NRA section 2, which would nullify the core features of the statutory relief from undercharges, do not warrant review by this Court.

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[10] In an attempt to create a conflict, Whitaker argues (Br. 8) that "the 'absurdity' and 'repeal-by-implication' arguments have no merit." This argument is a red herring as the court of appeals flatly rejected any suggestion that the NRA amended the Bankruptcy Code (Pet. 10a-11a).

[11] As reflected by the Conference Report, Congress intentionally used the words "non-operating motor carriers" in the NRA to include the "bankrupt carrier[s] that precipitated the situation by failing to file a negotiated rate as they had agreed to do." H.R. Rep. 359, *supra*, at 10.

III. Section 9 of the NRA Does Not Prohibit Application Of Section 2 Of The Same Act To Undercharge Claims Of Bankrupt Motor Carriers.

Section 9 of the NRA states, in part, that "[n]othing in this Act . . . shall be construed as limiting or otherwise affecting application of title 11, United States Code, relating to bankruptcy." Section 9 does not state that the NRA is inapplicable to bankrupt *carriers*, nor does it establish the existence of any conflict between the NRA and the Bankruptcy Code. Indeed, the contrary is implied. As the court of appeals explained: "Section 9 of the [NRA] merely provides that *if* a conflict exists between the [NRA] and the Bankruptcy Code, then the Code takes precedence." Pet. App. 13a (emphasis supplied; citation omitted).

Notwithstanding petitioner's contention (Pet. 27-28), there is no meaningful distinction between the circuits' interpretations of section 9. The petitioner can invoke section 9 to avoid application of the NRA to his undercharge claims *only* if he establishes that section 2 of the NRA conflicts with the Bankruptcy Code. As explained above, the court of appeals found no conflict, nor have any of the other circuits that have addressed that contention.

In the absence of such a conflict, nothing in section 9 or in the Bankruptcy Code insulates a nonoperating, bankrupt motor carrier from the strictures of the NRA or any other law of general applicability. If a bankrupt motor carrier ceases to operate, the mere fact of its

bankruptcy does not enable it to disregard the NRA limits on undercharge collections.[12]

IV. The Attempt To Invoke The Pension And Wage Claims Of Former Employees Of Bankrupt Motor Carriers Is Beside The Point.

Petitioner's argument (Pet. 20), which is reiterated by *amici*, that the "Ninth Circuit creates a contradictory statutory scheme that undermines federal labor, pension, and bankruptcy laws and defeats the statutory rights of employees and their health, welfare and pension funds," ignores the balance which Congress stuck between the interests of shippers in halting the undercharge crisis and the interests represented by petitioner and *amici*. As evident from petitioner's and *amici's* lengthy recitation of

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[12] This Court should pay no heed to Whitaker's implicit request (Br. 5-8) that it monitor the interplay of congressional committees. While Whitaker accuses the Public Works Committee of "circumventing the Judiciary Committee through . . . deceptive legislation" (Br. 7-8), he ignores the fact that the last minute amendment to section 9, if given the gloss advocated by the petitioner and *amici*, would "effectively nullif[y] the Act." *Lifschultz*, 63 F.3d at 627. Given the clearly articulated purpose of solving "the undercharge crisis . . . caused by certain trustees of bankrupt trucking companies repudiating the trucking company's own rates for past transportation services" (139 Cong. Rec. 9596 (daily ed., November 15, 1993)(Comments of Mr. Shuster)), it is inconceivable that a majority of Congress would favor adoption of a last minute amendment which would negate the fundamental purpose of the Act.

legislative history (Pet. 5-10),[13] Congress was well aware that the statutory compromise which it enacted would indirectly impact the various funds to which petitioner and the *amici* refer. Nonetheless, despite the *amici's* testimony and arguments made by NRA opponents during the floor debates in the House of Representatives (139 Cong. Rec. 9597, 9598, 9599, 9600 9601 (Comments of Messrs. Lipinski, Filner and Blackwell)), Congress balanced that impact against the "chilling effect on thousands of small businesses who are unable to make investment decisions or expand their hiring" until the "freight undercharge crisis" is resolved. 139 Cong. Rec. 9600 (daily ed., Nov. 15, 1993) (Comments of Mr. Valentine).[14]

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[13] Whitaker (Br. 3-4, 14-15) and Funds (Br. 6).

[14] *See also id.* (Comments of Mr. Pomeroy):

> [T]he Negotiated Rates Act of 1993, tries to make some sense out of bankruptcy proceedings which would seek to lay on small employers across this country liabilities for shipments they have long since concluded and forgotten about. The very real impact of bankruptcy estate actions attempting to reach in this foul fashion into the pockets of these small employers would be to bankrupt the small employers. That does not advance any social purpose for unfunded worker's pensions or anything else.

Unwilling to abide by the obvious compromise, petitioner (Pet. 9) and *amicus* Whitaker (Br. 13) imply that the "limiting or otherwise affecting" language of section 9 was added in response to Mr. Brooks' letter of November 10, 1993. In actuality, the language was added to the bill by Mr. Rahall on November 4, well before the exchange of correspondence between Messrs. Mineta and Brooks.[15] Given this chronology, the implication that this language was intended to appease Mr. Brooks has no factual basis.

Finally, petitioner's and *amici's* arguments are undermined by Mr. Lipinski's statements during floor discussions immediately before the vote in the House of Representatives. *See* 139 Cong. Rec. 9597, 9599 (daily ed., November 15, 1993). As those remarks demonstrate, the NRA's opponents understood that the "limiting or otherwise affecting" language of section 9 would not support the construction which petitioner and *amici* now advance in order to prolong the undercharge campaigns. Had the language in section 9 had the intended impact claimed by petitioner and *amicus* Whitaker, Mr. Lipinski's remarks would have been superfluous, and the proponents of the NRA would have been arguing against its enactment. Thus, petitioner's argument shows no error by the court of appeals and provides no justification for review of the instant case by this Court.

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[15] *See* Appellant's Excerpts of Record, Vol. 3, p. 532, filed May 20, 1994 in Ninth Cir. No. 94-55425. This language was inserted by Mr. Rahall to avoid any confusion with another undercharge bill introduced by Mr. Lipinski, H.R. 2021, which proposed specific amendments to the Bankruptcy Code and the ERISA statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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